

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
APPENDIX**

77-1067

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

DOCKET NO. 77-1067

UNITED STATES OF AMERICA,

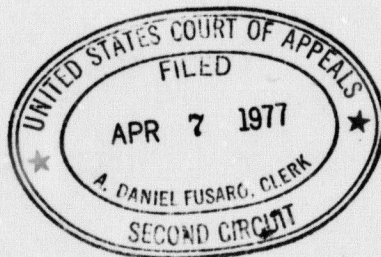
Appellee,

V.

MAURICE BURSE,

Appellant.

APPENDIX



R. WILLIAM STEPHENS
Attorney for Appellant
Maurice Burse
10 Lafayette Square
Buffalo, New York 14203
Tel.: (716) 852-7587

PAGINATION AS IN ORIGINAL COPY

APPENDIX

Contents

- A. Docket entries.
- B. Indictment.
- C. Opinion of District Court on photographic suppression hearing dated July 10, 1975.
- D. Opinion of Second Circuit Court of Appeals, United States v. Burse, 531 F. 2d 1151 (2d Cir. 1976).
- E. Decision and order of District Court on defendant's motion to dismiss indictment on double jeopardy grounds dated August 9, 1976.
- F. Order of District Court denying defendant's further motion to suppress identification testimony dated November 15, 1976.
- G. Charge of the court.
- H. Supplemental charge to jury.
- I. Proceedings in District Court on defendant's post trial motions including opinion of District Court denying motions.

John T. Curtin
CB-7

CR-74-227

TITLE OF CASE

ATTORNEYS

For U.S.:

U.S.

Skate only

~~XXXXXXXXXXXXXXXXXXXX~~

Assistant U.S. Atty.

U.S. Courthouse, Bflo, N.Y.
(716)842-3479

Roger Williams, AUSA

For Defendant:

(2) James Robinson

(1) R. William Stephens, Esq.
(assigned)

on appeal:

R. William Stephens, for defendant
Maurice Burse

10 Lafavette Square. Bflo

Offense: 7/30/74

3 Cts.

DATE 1974	PROCEEDINGS
Aug. 28	Filed Indictment
Aug. 28	J S 2 made <i>De Rose</i>
Aug. 29	Deft. pled not guilty. Discovery motions are to be filed by 9/17/74. If motions are filed, Govt is to respond by 9/24. If argument required, scheduled 10/1/74. Bail - continued on \$1,000 surety bond
Sept. 4	Proceedings before the Magistrate- Atty. Vincent Doyle advised the Court that he is appearing with the deft. Maurice Burse as a retained atty. for the arraignment and a determination will be made within two weeks whether he will be continued as atty. Not guilty plea entered for deft. Bail - \$1,000 recog. bond. Discovery motions are to be filed by 9/30; the Govt is to respond by 10/7; argument is scheduled 10/22/74.
Sept. 5	Filed Magistrate's Docket Sheet, complaint, affidavit, temporary commitment, \$1,000 surety bond, and bail affidavit (Stuyvesant Insurance Company - surety) for deft. De Rose
Sept. 5	Filed Magistrate's \$1,000 Recog. bond for deft. Maurice Burse
Sept. 10	Filed Ct. Steno's minutes of proceedings of 8/29/74
Sept. 17	Proceedings before the Magistrate-(Re: Darrell DeBose) No appearances for deft. No motions filed to date. If motions are filed the Govt is to respond by 9/24 and argument as scheduled on 10/1/74
Sept. 24	Proceedings before the Magistrate-No motions have been filed to

DATE	PROCEEDINGS
974	
Sept. 24	deft. DeBose. Case is being held here pending filing of motions for co-deft, Burse.
Oct. 1	Proceedings before the Magistrate (Re: Maurice Burse) No appearance for deft. No motions have been filed to date
Oct. 7	Filed deft Maurice Burse's notice of motion for an order directing disclosure, discovery and inspection, production, Bill of Particulars Ret. 10/22/74 Magistrate
Oct. 8	Proceedings before the Magistrate - No appearance for Defendant Maurice Burse; discovery motion has been filed. Argument as scheduled on October 22, 1974
Oct. 15	Filed Govt's response to deft Maurice Burse's pre-trial motion
Oct. 22	Proceedings before the Magistrate - Atty. Joseph Bermingham of counsel for Vincent Doyle, withdrew as retained counsel for Defendant Maurice Burse; Deft. requested assignment of counsel. Court requested defendant to fill out financial affidavit. Adj. to November 5, 1974 for argument of motions.
Oct. 29	Filed Cy. 5 of CJA-20 - Order appointing R. William Stephens, Esq., counsel for the Defendant. ---MAXWELL, Magistrate.
Nov. 1	Filed Govt's motion to move action for trial-----
Nov. 18	Filed deft's (Maurice Burse) notice of motion for discovery and inspection, ret. 11/19/74 before the Magistrate.
Nov. 19	Proceedings before the Magistrate - Re: Maurice Burse. Motions have been filed. Attys. requested adj. of argument for two weeks. Argument adj. to 12/3/74
Nov. 20	Filed Govt's response to Defendant Maurice Burse's motion for Discovery---
Dec. 3	Proceedings before the Magistrate - Atty. R. William Stephens with the defendant Maurice Burse- Argument on motion to produce statements of co-conspirators and witnesses at the bank- denied. Adj. to 12/17/74 for argument on defendant's motion for "in camera" inspection of Grand Jury minutes.
Dec. 12	Filed Deft. Maurice Burse notice of motion for in camera inspection by Court of the Grand Jury minutes, etc., and for in camera inspection by the Court of all statements, FBI 302 reports and other writings the Govt's file, etc. ret. 12/17/74- Magistrate
Dec. 17	Proceedings before the Magistrate - Maurice Burse - Adj. at the request of the Government to Dec. 31, 1974. for argument.
Dec. 31	Proceedings before the Magistrate - Maurice Burse - Govt requested additional two weeks to respond to deft's motion. Adj. to 1/14/75 for argument.
1975	
Jan. 9	Filed Govt's response to deft Burse's motion for in camera inspection
Jan. 14	Proceedings before the Magistrate - Argument on motion for "in camera" inspection of Grand Jury minutes-granted. Argument on motion for "in camera" inspection of Govt file for Brady material-denied.
Jan. 27	Filed Deft. Burse's notice of motion/- ^{for a hearing} to determine if certain witnesses who have identified photographs of Deft., identified such photographs in an impermissibly suggestive procedure - ret. 2/11/1975-Magistrate
Jan. 29	Filed Magistrate's Decision on Deft. Burse's motion alleging hearsay testimony was introduced against him in the grand jury proceeding, etc. Maxwell, Magistrate
Jan. 30	Filed Govt's response to motion by Deft. Maurice Burse for hearing to determine possible suggestive identification procedures

DATE 1975	PROCEEDINGS	CLERK'S FEES	
		PLAINTIFF	DEFENDANT
Feb 10	Re: Maurice Burse. Motion by deft for identification hearing until 2/18 because of illness of defense counsel.		Adj
Feb 18	Re: Maurice Burse. Deft's motion for identification hearing. Hearing scheduled for Friday, 2/21		Hearing
Feb 21	Re: Maurice Burse. Motion by the deft for the disclosure of names of certain Govt. witnesses. Motion denied.		
Mar. 3	Return date for motions. Wade hearing for deft. Burse to be scheduled.		
Mar. 18	Filed subpoena--Barbara Raimos, served on 3/14/75		
Mar. 19	Identification hearing. Government rests. Defendant rests. Transcript to be made. When available court will set a briefing schedule		
Mar. 20	Filed Cy. 5 of CJA 21--authorization for transcript--cy. 4 to Adm. Office		
Apr. 4	Filed Ct. Steno's transcript of proceedings of hearing on motion to suppress, held before the Hon. John T. Curtin on 3/19/75		
Apr. 7	Filed cy. 2 of CJA 21--voucher for Ct. Steno's transcript in the amt of \$91.25. Orig. to Adm. Office for payment		
May 27	Filed Deft' Burse's memorandum in support of motion to suppress Photographic Identification		
May 27	Filed Government's memorandum Of Law		
May 27	Filed Govt's Proposed Conclusion Of Law		
May 27	Filed Govt's Proposed Findings Of Fact		
May 27	Return date for briefs, etc. Govt to file brief today.		
July 2	Filed Pet. & Order for Writ of Habeas Corpus Ad Proseq., for plea - Darrell DeBose--CURTIN, J.- ret. 7/3/75		
July 7	Filed Writ of Habeas Corpus Ad Prosequendum, for Darrell DeBose, for plea, exec.--7/3/75-		
July 3	Deft. Darrell DeBose, present with counsel, enters a plea of guilty to count One of the Indictment. Sentence is deferred 8/25/75.		
July 8	Filed Two subpoenas - Evon Wright ret. 7/3/75- served 7/3/75; Evon Wright, ret. 8/5/75- served 7/3/75 (this entry applies to Cr-74-234)		
July 10	Filed Decision and order denying deft. Burse's motion to suppress: Curtin, J. Pre-trial meeting is set for 7/16/75 at 9:00 am.		
July 11	filed ct. steno's transcript of proceedings of July 3, 1975		
July 11	filed cyps 2,5 authorization and voucher for transcript for Maurice Burse in the amt. of \$6.00; Orig. to the Adm. office for payment		
July 16	Pre-trial conference held for deft. Burse. Court orders trial on 8/12/75 or any day thereafter;		

DATE 1975	PROCEEDINGS	CLERK'S FEES	
		PLAINTIFF	DEFENDANT
Aug. 4	Filed Cv. of letter dated 7/28/75 from Atty. R. William Stephens, Esq., counsel for deft. Burse, to AUSA William Skretny, setting forth the substance of the understanding reached during the pre-trial conference held in chambers on 7/16/75		
Aug. 4	Filed letter to Judge Curtin, dated 7/28/75, from Atty. R. William Stephens, Atty. for deft. Burse, requesting that the deft. be furnished at Govt. expense, a transcript of all testimony of the Co-deft. DeBose in the case of U.S. v. Green.		
Aug. 4	Filed Pet. & Ord. for Writ of H.C. Ad Testificandum for Darrell DeBose, ret. 8/8/75		
Aug. 8	Filed Three subpoenas - Detective Joseph Schwartz, Michael Cheatom, Michael Piercer, served 8/5/75		
Aug. 13	Filed Writ of Habeas Corpus Ad Testificandum - executed - 8/11/75		
Aug. 13	Filed Eleven subpoenas - Louise Stevens, Evon Wright - served 8/7/75; Barbara Raimos, Albert DeBose, served 8/8/75; Louise Stevens, Albert DeBose, Mrs. Anna DeBose, Detective Joseph Schwartz, Evon Wright, served 8/11/75; Linda Giles, ret. no service - 8/11/75; Linda Giles, served 8/12/75		
Sept. 4	Filed Cy. 2 of CJA-21 - Voucher for transcript in the amt. of \$78.75; Orig. to the Adm. Office for payment.		
Sept. 3	Filed Ct. Stenographer's transcript of the testimony of the witnesses Darrell DeBose, and Yvonne Wright, taken at trial of U.S. v. Gary Green, Cr-74-234, before Judge Curtin, Buffalo, N.Y., 8/5/75		
Sept. 18	Filed order under rule 17(b) that subpoenas be issued on behalf of deft. Burse for service upon: Louise Stevens, Patricia Burse, and Kenneth Burse		
Sept. 19	Filed Order that subpoenas Duces Tecum in behalf of Deft. Burse, upon the Buffalo City Court, and the Town of Tonawanda Justice Court be served under the provisions of Rule 17(b) of the Federal Rules of Criminal Procedure--CURTIN, J.		
Sept. 22	Filed sixteen subpoenas - Evon Wright, served 9/18/75; Det. Joseph Schwartz, Louise Stevens, Evon Wright, Albert DeBose, Mrs. Anna DeBose, Michael Pierce, Michael Cheatom, Craig Burse, Mrs. Burse, Jerome Burse, Helen Jurek, Mrs. Pierce, Kenneth Burse, Patricia Burse, all served 9/19/1975; Michael Piercer, ret. no-service.		
Sept. 22	Filed Deft's request for Voir Dire Examination?		
" 23	Govt. moves case ready for trial for Deft. Maurice Burse, before Judge Curtin, at Buffalo, N.Y., whereupon the jury is duly enpanelled Trial adj. until tomorrow - Sept. 24, 1975		
" 24	Trial continues from yesterday with the same appearances & jury -		
" 24	Filed two subpoenas (D.T.) - Record Room Custodian, Buffalo City Court, and Criminal Record Custodian Town of Tonawanda Justice Court, served 9/22/75		
" 25	Trial continues from yesterday with the same appearances & jury. Trial is adj. until tomorrow, Sept. 26, 1975		
" 25	Filed Six subpoenas - City Engineer, City of Lackawanna, Barbara Ramos, Mrs. Pierce, Michael Pierce, Michael Cheatom, Mrs. Cheaton, served 9/24/75		

DATE 1975	PROCEEDINGS	CLERK'S FEES	
		PLAINTIFF	DEFENDANT
Sept. 26	Trial continues from yesterday with the same appearances & jury transcript of Anna DeBose from prior trial U.S. v. Green, read into evidence. Deft. moves to dismiss the indictment on grounds the government has failed to prove guilty beyond a reasonable doubt. Motion denied. Trial adj. until 9/30/75		
Sept. 26	Filed subpoena - Barbara Ramos, served 9/22/75		
Sept. 29	Filed two subpoenas Eugene F. Jurkiewicz, Frank Desmore, served 9/26/75		
Sept. 30	Trial continues from 9/26/75. Deft. renews motions made at end of govt's case. Denied. Trial is adj. 10/1/75		
Oct. 1	Trial continues from yesterday with the same appearances & jury-- Jury retires to deliberate upon their verdict. Jury to return Oct. 2, 1975, to further deliberate upon their verdict		
Oct. 1	Filed two subpoenas - Raymond C. Kruger, served 9/29/75. Carol Peters, returned not served		
Oct. 2	Jury resumes their deliberations from yesterday. Jury returns with the following verdict. Deft. Burse guilty on Count One, not guilty on count two and not guilty on count three of the indictment. On application of the Govt. bail is increased from \$1,000 recognizance bond to \$5,000 recog. bond. Motions against the verdict are to be heard after the court rules on the defendants motion for a mistrial.		
Oct. 2	Filed Jury Verdict		
	Filed \$5,000 personal recognizance bond		
Oct. 6	Filed Cy. 5 of CJA-21 - Authorization for transcript in the amt of \$62.50; Cy. mailed to the ADM, office		
Oct. 6	Filed Deft. Burse's notice of motion for a judgment of acquittal, etc. ret. as the court shall direct		
Oct. 8	Filed Order that the parties are directed to file memoranda in support of their positions re Deft's motions for a judgment of acquittal, new trial, and mistrial, not later than October 28, 1975, and the court will hear oral argument on these motions on October 31, 1975 at 9:30 a.m., pur. to Rules 29 and 33, the court specifically extends the time for the argument of these motions until the 31st of October 1975-CURTIN, J.		
Oct. 8	Filed Cy. 2 - of CJA-21 - Voucher for transcript in the amt. of \$56.75; Orig. to the Adm. office for payment.		
Oct. 10	Filed Deft. Burse's notice of motion for an order requiring the United States Atty. to submit a complete investigation file to be marked as a court exhibit in this case, and will further move for an order of this court allowing the deft.'s atty. to inspect said file to determine if additional material under Brady v. Maryland was denied to the deft. by the U.S. Attorney, and etc., ret. 10/14/75		
Oct. 14	Motion by deft. to require Govt. to turn over to deft. their investigation file. Adj. to 10/20/75		

DATE 1975	PROCEEDINGS	CLERK'S FEES	
		PLAINTIFF	DEFENDANT
Oct. 21	Filed Order that the U.S. Atty., shall file as a court exhibit in this case the complete investigation file to be sealed as a court exhibit and deft's motion requesting such relief is hereby granted, and it is further ordered that the defendant's motion to allow the defendant's Atty. to inspect such file, is denied pending the resolution of other motions made by the deft., particularly motions for a mistrial, a new trial and for a directed judgment of acquittal---CURTIN, J.		
Oct. 20	Motion to compel Govt. to turn over to deft. its investigative file. Court orders Govt. to file as a court exhibit and deliver to the Clerk of court.		
Oct. 28	Filed Government's memorandum In Opposition to Deft's motions For Judgment of Acquittal, etc.		
Oct. 30	Filed Deft. Burse's withdrawal of motion made during the trial of the above entitled action at the close of the prosecutor's summation for a mistrial.		
Oct. 30	Filed Deft's memorandum in support of motion for new trial or for directed judgment of acquittal or for dismissal of the indictment without prejudice		
Oct. 28	Return date for Government brief; to be filed today.		
Oct. 31	Oral argument on defts motion for judgment of acquittal and for a new trial. Motions for a mistrial is withdrawn. Decision reserved. Adj. to 11-7-75 decision.		
Nov. 7	Decision on deft. Burse's motion for a new trial and in the alternative for dismissal of the Indictment without prejudice. Court denies deft's motion. Sentence is deferred 11/17/75.		
Nov. 14	Filed Investigative file of U.S. Atty's Office for in-camera inspection, for Deft. Maurice Burse, marked as Court Exhibit		
Nov. 17	Deft. Maurice Burse is sentenced under the Federal Youth Correction Act as follows: Deft. is remanded to the custody of the Atty. Gen. pur. to Title 18, Sect. 5010(b) as a Youthful Offender. Curtin, Bail to continue pending appeal. New bail bond is to be executed by the deft.		
Nov. 17	Filed \$5,000 personal recog. bond for Maurice Burse, pending appeal		
" 17	Filed Deft. Maurice Burse notice of appeal. cy. to the U.S. Atty., deft. and the CCA with cy. of docket entries, Form CJA-23, Form A		
Nov. 18	Filed Cy. 5 - CJA-21 - authorization for transcript; Cy. to Adm. office.		
Nov. 19	Filed Judgment and Commitment for Deft. Maurice Burse. Commitment issued, to Marshal to retain, until disposition of appeal.		
Dec. 1	Filed Scheduling Order from the CCA, record to be docketed in the Ct. of Appeals, 12/19/75, and etc.		
Dec. 8	Orig. pertinent papers, Clerk's certificate, index, docket entries, mailed to the CCA - appeal for Maurice Burse		
Dec. 19	Filed Ct. Stenographer's minutes of the proceedings held before Judge Curtin, on Feb. 18, 1975		
Dec. 19	Filed Five Volumes of trial transcript (pages 1 thru 990)		

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Yr. Docket No. Def.

DATE	PROCEEDINGS (continued) (Document No.)	V. EXCLUDABLE DELAY			
		(a)	(b)	(c)	(d)
12/19/75	Filed Cy. 2 of CJA-21 - Voucher for Transcript in the amt. of \$1,491; Orig. to the Adm. Office for payment.				
12/24/75	Filed petition and order for Writ of H.C. Ad Prosequendum, Curtin, J.				
12/30/75	Filed Writ of H.C. Ad Proseq.				
12/22/75	For Sentence. Adj. to 12/29/75				
12/29/75	On motion of the Govt. deft. Darrell DeBose is sentenced as follows: Deft. is remanded to the custody of the Atty. General pursuant to the provisions of the FYCA. Title 18, U.S.C., Sect. 5010(b); Curtin, J.; Cts. 2, 3 are hereby dismissed.				
5/10/76	Filed certified cy. of the Mandate from the CCA with Opinion re Maurice Burse, that the action be and it hereby is remanded to the District Court for further proceedings in accordance with the opinion of this Court.				
5/10/76	Set date for trial - Maurice Burse. Trial to begin on 6/22/76. Court directs that the deft. need not report in person any more to U.S. Marshal. The deft. is to execute a recognizance bond in the amt. of \$5,000. Roger Williams, replaces William Skretny, as Atty. for the Govt.				
5/10/76	Filed \$5,000 unsecured bond				
5/27/76	Filed Deft. Burse notice of motion for an Order dismissing the Indictment on all its counts on the grounds that further prosecution is barred under the Fifth Amendment to the Constitution, etc., under the double Jeopardy Clause, etc., ret. 6/7/76				
6/2/76	Filed Deft's memorandum in support of Deft's memorandum in support of Deft's motion to dismiss Indictment on the Grounds that further prosecution is barred under the fifth amendment to the Constitution of the U.S.				
7/76	Filed Government's response to defendant Burse's motion to dismiss the Indictment				
6/7/76	Return of motions - Maurice Burse - Govt. has filed a response to deft's motion. Court will hold meeting with counsel to				

UNITED STATES DISTRICT COURT
CRIMINAL DOCKET

DATE	PROCEEDINGS (continued)	V. EXCLUDABLE DELAY			
		(a)	(b)	(c)	(d)
6/7/76	discuss motion on 6/16/76 at 9:00 a.m.				
6/9/76	Filed Cy. 5 ofCJA-20 - re-appointing Mr. Stephens, in case, based on remand from the CCA, for a new-trial--Curtin, J.				
6/17/76	Filed three subpoenas - Helen Jurek - City Engineer; served 6/15/76; Raymond C. Kruger, served 6/16/76				
6/18/76	Filed 6 subpoenas - Mrs. Burse, Jerome Burse, Craig Burse, Louise Stevens, Joseph Schwartz, and Julia Kraska, served 6/16/76				
6/16/76	Oral argument on motion to dismiss the Indictment. Submitted.				
6/21/76	Filed three subpoenas Albert DeBose, Michael Cheatom, Mrs. Cheatom, served 6-17-76. Filed one subpoena Christopher Henderson, served 6-18-76				
8/9/76	Filed Decision and Order that the defense motion for dismissal of Count One is denied. A meeting of counsel is set for 8/17/76 -- 9:00 a.m. --CURTIN, J.				
8/17/76	Pre-trial conference held. Adj. to 9/21/76 for further pre-trial.				
9/21/76	Meeting held. Adj. 10/5/76 for further meeting.				
9/23/76	Filed four subpoenas - Evon Wright, Mishael Piercer, Mrs. Yvonne Pierce, Linda Giles, returned no-service				
10/5/76	Meeting held with the Court. Hearing scheduled for 10/27/76				
10/27/76	Hearing scheduled but not held. Counsel explains to the court that hearing would not establish facts to expulcate the deft. Motions before the court are submitted.				
11/1/76	Filed subpoena - Raymond Kruger- served 10/27/76				
11/15/76	Filed Order that for the present the motion of deft. to suppress testimony is denied. Retrial of this case is set for 12/14/76. the Court finds that the delay caused by the consideration of the motions was made with the consent of the defendant and was in the public interest--CURTIN, J.				

CRIMINAL DOCKET

Cr-74-227

7-10065

DATE 1976	PROCEEDINGS	CLERK'S FEES	
		PLAINTIFF	DEFENDANT
Dec. 14	Government moves case ready for trial before Judge Curtin, at Buffalo, New York, whereupon the jury is duly empanelled; Trial is adj. to a date to be determined by the Court.		
Dec. 17	Filed Pet. & Ord. for W.H.C. Ad Testificandum for Witness Gary Green, ret. 12/22/76--Curtin, J.		
Dec. 17	Filed Pet. & Ord. for W.H.C. Ad Testificandum for Witness Darrell DeBose, ret. 12/20/76-CURTIN, J.		
Dec. 21	Filed Petition and Order for Writ of H.C. Ad Testificandum for witness Gary Green ret. 12/22/76--Curtin, J.		
Dec. 21	Trial resumes from 12/14/76 same appearances and jury		
Dec. 21	Filed Transcript of proceedings held on 12/29/75		
Dec. 22	Filed petition & order for writ of habeas corpus ad prosequendum. CURTIN, J.		
Dec. 23	Filed three subpoenas - Michael Cheatom, Betty Cheatom, & Louise Stevens served 12-17-76; Filed 11 subpoenas- Christopher Henderson, Louis Stevens, Evon Wright, Joseph Schwartz, Christopher Henderson, Helen Jurek, Mrs. Burse, Albert DeBose, Raymond Kruger, Barbara Ramos, & Anna DeBose served 12-20-76; Filed subpoena Manufactures & Traders Trust Co., (DT) served 12-20-76; Filed one subpoena Albert DeBose served 12-21-76; Filed one subpoena City Engineer, City of Lackawanna, returned no service.		
Dec. 27	Filed Ct. Stenos transcript of proceedings held before Hon. John T. Curtin on 12/21/76.		
Dec. 28	Filed three subpoenas - Douglas Ehlert, Graig Burse, and Jerome Burse, returned no service.		
Dec. 28	Filed marshal's return of Writ of Habeas Corpus ad Testificandum, returned no service.		
Dec. 28	Filed copy 2 CJA 21 voucher for ct. steno, in the amt. of \$13.00, copy 1 to Adm. Office for payment. CURTIN, J.		
Dec. 28	Filed copy 5 CJA 21 authorization, copy 4 to Adm. office. CURTIN, J.		
Dec. 29	Filed subpoena - Linda Giles - returned no service.		
Dec. 30	Filed deft's motion for dismissal or for judgment or acquittal or in the alternative, for a new trial, ret. 1-10-77.		
Dec. 32	Trial continues from yesterday with the same appearances and jury Trial is adj. until 12-23-76.		
Dec. 23	Trial continues from yesterday with same appearances & jury. Deft. moves for a judgment of acquittal. Motion denied. Trial Adj. until 12-27-76 at 9:30 am		

UNITED STATES OF AMERICA

-vs-

MAURICE BURSE
DARRELL DeBOSE

MARCH, 1974 SESSION
REMAX

No. C R - 74 - 227

Via. Title 18,
United States Code,
Sections 371
2113(a)
2113(b)

COUNT I

The Grand Jury Charges:

On or about July 30, 1974 and continuously thereafter up to and including the date of the filing of this indictment, at Lackawanna, in the Western District of New York, and elsewhere within and without said District, the defendants

MAURICE BURSE
and
DARRELL DeBOSE

did unlawfully, willfully and knowingly combine, conspire, confederate and agree together and with each other, and with Gary Olson, a juvenile not named as a defendant, to commit certain acts in violation of Title 18, United States Code, Section 2113(b) of the laws of the United States, that is, to knowingly and willfully and unlawfully rob the Manufacturers and Traders Trust Company, Ridge Road Office, Lackawanna, New York, the deposits of which were then and there insured by the Federal Deposit Insurance Corporation;

In violation of Title 18, United States Code,
Section 371.

...-7-10-70-151-...

BEST COPY AVAILABLE

OVERT ACTS

1. On or about July 30, 1974, at Buffalo, in the Western District of New York, the defendants, MAURICE BURSE and DARRELL DeBOSE and Gary Green, a juvenile not named as a defendant, met together and with each other.

2. On or about July 30, 1974, at Lackawanna, in the Western District of New York, defendant DARRELL DeBOSE entered the Manufacturers and Traders Trust Company Bank, Ridge Road Office, Lackawanna, New York and took and carried away the sum of approximately four hundred and ten dollars (\$410) from that bank.

3. On or about July 30, 1974, at 40 Steeławanna Street, Lackawanna, New York, in the Western District of New York, defendants MAURICE BURSE and DARRELL DeBOSE and Gary Green, a juvenile not named as a defendant, met together and split the approximately four hundred and ten dollars (\$410) taken from the Manufacturers and Traders Trust Company Bank, Ridge Road Office, Lackawanna, New York.

4. The Grand Jury realleges the acts described in Counts Two and Three as overt acts and incorporates them herein by reference.

All in violation of Title 18, United States Code, Section 371.

COUNT VI

The Grand Jury Further Charges:

On or about July 30, 1974, in the City of
Lackawanna, in the Western District of New York, the
defendants

MAURICE BURSE
and
DARRELL DeLOSE

did take and carry away, with intent to steal and purloin
from the Manufacturers and Traders Trust Company Bank,
Ridge Road Office, Lackawanna, New York, the deposits of
which were then insured by the Federal Deposit Insurance
Corporation, the sum of about four hundred and ten dollars
(\$410) belonging to and in the care, custody, control,
management and possession of that bank;

In violation of Title 18, United States Code,
Section 216(5).

COUNT III

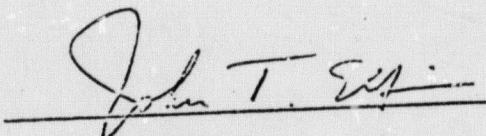
The Grand Jury Further Charges:

On or about July 30, 1974, in the City of Lackawanna, in the Western District of New York, the defendants

MAURICE BURSE
and
DARRELL DeBOSE

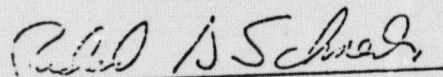
by intimidation, did take from the person and presence of Helen Jurek about four hundred and ten dollars (\$410.00) in money, belonging to and in the care, custody, control, management and possession of the Manufacturers and Traders Trust Company Bank, Ridge Road Office, Lackawanna, New York, the deposits of which were then insured by the Federal Deposit Insurance Corporation;

In violation of Title 18, United States Code, Section 2113(a).



JOHN T. ELFVIN
United States Attorney

A TRUE BILL:



FOREMAN

Form DJ-195
(Ed. 2-7-66)

No. CR-74-227

UNITED STATES DISTRICT COURT

WESTERN District of NEW YORK

XXXXXXXXXXXXXXX

THE UNITED STATES OF AMERICA

vs.

MAURICE BURSE

DARRELL DEPOSE

INDICTMENT

FILED MAY 1 1974

CLERK OF COURT

FILED IN OPEN COURT THIS day

of A. D. 1974

CLERK OF COURT

U.S. DISTRICT COURT

WESTERN DISTRICT OF NEW YORK

AT NEW YORK, NEW YORK

67-1000-000

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

RECEIVED

JUL 1 1975

FRANCIS, BARNARD, WEISS & HALPERN

POST MARKED

UNITED STATES OF AMERICA

Plaintiff

-VS-

CR-74-227

MAURICE BURSE
DARRELL DeBOSE

Defendants

RECEIVED

JUL 1 1975

FRANCIS, BARNARD, WEISS & HALPERN

POST MARKED

On July 30, 1974 at about 10:30 in the morning, a bank robbery took place at the Ridge Road office of the Manufacturers and Traders Trust Company in Lackawanna, New York. The defendants, Maurice Burse and Darrell DeBose, have been indicted for conspiracy and for a violation of 18 U.S.C. §§2113(a) and 2113(b). One Gary Green, a juvenile not named as a defendant, was named as a coconspirator.

After defendant Maurice Burse moved to suppress photographic identification, a hearing was held on March 19, 1975. A witness, Barbara Ramos, and an FBI agent testified about the events of that day and the subsequent photographic identification made by Mrs. Ramos. After FBI Agent Kruger learned that Mrs. Ramos observed two Negro

boys running in the area of her home, he visited her on August 7, 1974. He spread six photographs on the kitchen counter and Mrs. Ramos identified the photograph of Maurice Burse as one of the men she had seen running near her home shortly after the robbery occurred. At the time she observed the two young men running in the area of her driveway, she was holding an infant in her arms when the youths ran past her and only observed them for "maybe a second or two, not even that." However, she recognized Burse as someone she had seen on a number of prior occasions participating in neighborhood basketball games. Five of the photos were obtained from the Buffalo Police Department and one, that of defendant Maurice Burse, was obtained from the FBI files. The Burse photo has the legend on its face "Federal Bureau of Investigation, Buffalo, New York." Four of the other photos have reference to Buffalo, New York and one has no description of place of origin. Defense complains that the spread was impermissibly suggestive, because it is obvious that four of the pictures have the dates of taking on the face of the photo. One was taken on March 11, 1960,

another on June 19, 1962, the third on February 16, 1958 and the fourth on October 3, 1966. From this, defendant argues that it must have been obvious to the witness that these photos could not be the photograph of the suspect. But it does not appear that she was aware of the numbers or what they meant. However, it would be a better practice to not show witnesses photographs with this information on the print.

The defense also complains about the fact that only six photographs were taken. No doubt it would be better to exhibit a greater number of photos. See United States v. Boston, 508 F.2d 1171, 1177 (2d Cir. 1974). Nevertheless, under all of the circumstances the procedure used was not so "impermissibly suggestive to give rise to a very substantial likelihood of irreparable misidentification." Simmons v. United States, 390 U.S. 377 (1968).

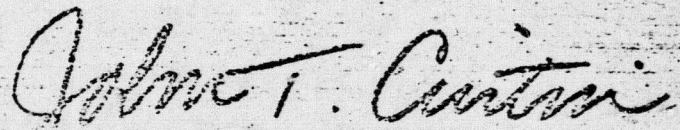
The court has examined the photographs which were displayed to the witness. It is evident that the pictures of the individuals displayed there are similar

in facial characteristics and there is nothing to highlight the man who was a suspect in this case.

The motion of defendant to suppress is denied.

A pretrial meeting is set for Wednesday, July 16, 1975
at 9:00 a.m.

So ordered.



JOHN T. CURTIN
United States District Judge

DATED: July 10, 1975

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 787—September Term, 1975.

(Argued March 3, 1976

Decided March 8, 1976.)

Docket No. 75-1388

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

MAURICE BURSE,

Defendant-Appellant.

Before:

KAUFMAN, *Chief Judge,*
SMITH and ANDERSON, *Circuit Judges.*

Appeal from conviction and sentence on trial to the jury
in the United States District Court for the Western Dis-
trict of New York, John T. Curtin, *Chief Judge*, on charge
of conspiracy to rob federally insured bank.

Reversed.

R. WILLIAM STEPHENS, Buffalo, N.Y., *for Appel-
lant.*

WILLIAM M. SKRETNY, First Asst. U.S. Attorney
(Richard J. Arcara, U.S. Attorney for the

Western District of New York, on the brief),
for Appellee.

SMITH, *Circuit Judge*:

On the morning of July 30, 1974, a branch of the Manufacturers and Traders Trust Company Bank located in Lackawanna, New York was robbed of roughly \$400. Approximately one month later, appellant Maurice Burse was indicted for that crime and charged with violating 18 U.S.C. §§2113(a), 2113(b) and 371 which make it illegal to rob a federally-insured bank or to conspire to do the same.

Indicted with Burse was one Darrell DeBose. A juvenile by the name of Gary Green was designated by the grand jury as an unindicted co-conspirator.

At Burse's trial in the United States District Court for the Western District of New York (John T. Curtin, *Chief Judge*), the government's case rested heavily upon the testimony of DeBose, Burse's alleged partner in the July 30 holdup. DeBose had earlier pled guilty to one count of the three-count indictment stemming from that offense. Notwithstanding DeBose's testimony, the jury acquitted Burse on the substantive counts. However, Burse was convicted of conspiracy.

From that conviction, Burse now appeals. For the reasons discussed below, we reverse.

I. THE ALIBI INSTRUCTION

Burse presented three witnesses to support his claim that, on the morning of July 30, 1974, he was in and about his family's house. Despite this evidence indicating that Burse was not at the scene of the crime but was cleaning up his family's yard at the time of the robbery, the court refused to give a jury instruction to the effect that, even

If Burse's alibi witnesses were disbelieved, the burden of proof remained with the government.

Burse now claims that the failure to give an alibi instruction was reversible error. We agree.

It is well established that, under proper circumstances, the jury must be given an alibi instruction when the defense so requests. *United States v. Megna*, 450 F.2d 511 (5th Cir. 1971); *United States v. Marcus*, 166 F.2d 497, 503-04 (3d Cir. 1948). The reasoning behind this rule is not difficult to appreciate. Jurors are, by definition, untrained in the specifics of the law and, accordingly, must be instructed as to the legal standards they are bound to apply. In those cases where an alibi defense is presented, there exists the danger that the failure to prove that defense will be taken by the jury as a sign of the defendant's guilt.

Of course, failure to establish an alibi does not properly constitute evidence of guilt since it is the burden of the government to prove the complicity of the defendant, not the burden of the defendant to establish his innocence. That, however, is a point with which we cannot expect jurors to be familiar.

While jurors are apprised in general terms of the government's burden to prove each element of the charged offense beyond a reasonable doubt, this broad admonition as to the government's obligations will not suffice under circumstances such as those here. Even when the jury has been instructed as to the government's burden, there remains the danger that the effect of the attempted alibi defense will be misunderstood. Only a specific instruction can insure that this problem will not occur.

There have been occasions when the courts have viewed the absence of an alibi instruction as harmless. When such an instruction has not been requested or when the evidence of the defendant's guilt has been overwhelming or when

the evidence in support of the alibi defense has been negligible or when the defendant's presence at the scene of the crime has not been an element of the offense which the government was required to prove, the courts have held that failure to provide an alibi instruction does not require reversal. *United States v. Coughlin*, — F.2d — (2d Cir., April 15, 1975), slip op. at 2895; *United States v. Cole*, 453 F.2d 902 (8th Cir. 1972); *United States v. Erlengbaugh*, 452 F.2d 967 (7th Cir. 1971), *aff'd on other grounds*, 409 U.S. 239 (1972); *United States v. Lee*, 483 F.2d 968 (5th Cir. 1973).

Without commenting on the propriety of these exceptions, we note that none of these mitigating circumstances is present here. An alibi instruction was specifically requested by Burse's counsel. The witnesses presented by Burse provided substantial confirmation of his alibi defense. In the words of Chief Judge Curtin himself, the evidence against appellant Burse was "not overwhelming."¹ And, finally, while Burse was acquitted on the substantive counts and while his presence at the scene of the crime was not necessary for his conspiracy conviction, the prosecution's theory of the case rested heavily on Burse's alleged presence at the scene of the robbery since the government asserted that Burse's presence at the crime was the culmination of the alleged conspiracy.

In summary, we hold that, on the facts of this case, Burse was entitled to an alibi instruction. As a general rule, we think it best for such instructions to be given where alibi is claimed. When, as here, the evidence against the accused is less than overpowering, failure to provide such an instruction in such circumstances constitutes reversible error.

¹ Judge Curtin continued: "I think [this] is a case where the jury could easily have voted up or down on the evidence presented here."

II. THE PROSECUTION'S CLOSING ARGUMENT

As a second basis for appeal, Burse argues that the prosecution's closing statement in the trial below was sufficiently prejudicial to require reversal. We agree.

This court has repeatedly addressed itself to the problem of prosecutorial misbehavior in the form of inflammatory or insinuating questions and statements. *United States v. Bivona*, 487 F.2d 443 (2d Cir. 1973); *United States v. White*, 486 F.2d 204 (2d Cir. 1973); *United States v. Drummond*, 481 F.2d 62 (2d Cir. 1973). We have consistently warned that such misconduct may constitute sufficient cause for reversal.

The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, and twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor—indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.

It is fair to say that the average jury, in a greater or less degree, has confidence that these obligations, which so plainly rest upon the prosecuting attorney, will be faithfully observed. Consequently, improper suggestions, insinuations, and, especially, assertions of personal knowledge are apt to carry much weight

against the accused when they should properly carry none.

Berger v. United States, 295 U.S. 78, 88 (1935).

This is a case where the government's closing argument, delivered by William Skretny, First Assistant United States Attorney for the Western District of New York, violated permissible standards of prosecutorial conduct. We come to this conclusion for the following reasons.

(a) Burse's lawyer, in order to impeach DeBose's credibility as a government witness, established that, at the time of his testimony against Burse, DeBose was free on bail and awaiting sentence. In his closing argument, the prosecutor attempted to refurbish DeBose's credibility by implying that DeBose had already served his term in jail when, in fact, he had not.

(b) The prosecutor in his closing comments gratuitously referred to the allegedly high incidence of bank robberies and left open the inference that this general trend constituted evidence of Burse's guilt in this specific instance.

(c) The prosecutor in his closing remarks implied that the failure of the defendant to provide proof of his innocence was to be taken as evidence of his guilt and came dangerously close to direct comment on Burse's failure to take the stand, remarking that "the defendant did not tell you about all the truths."

(d) In his summary, the prosecutor referred to portions of a signed statement made by DeBose which were not introduced into evidence at the trial.

(e) The prosecution made improper and potentially derogatory comments about Burse's lawyer, to wit: "Mr. Stephens [Burse's lawyer] tried to get Barbara Ramos [a witness] to say . . ."; Mr. Stephens "attempted to give you [the jury] the impression that . . ."

(f) The court, on its own initiative, felt compelled to tell the jury that the prosecution in its closing argument may have misrepresented certain testimony presented earlier in the trial. Indeed, on several occasions, the court cautioned the jury that the government's closing argument was replete with "speculation" which the jury was bound to disregard.

(g) The prosecution stated—incorrectly—that a key defense witness had admitted to being drunk on the day of the robbery and on the day she testified in court.

(h) The prosecution continually told the jury that "we know" certain testimony "is true," leaving the impression that the government had within its possession evidence of Burse's guilt which had not been given to the jury.

Perhaps if the case against Burse had been stronger, these improper comments would be of less significance. However, in an admittedly close case such as this, prosecutorial misstatements take on greater importance, whether those statements are intentional or not. The observations of the Supreme Court in the *Berger* case, *supra*, seem particularly appropriate here:

The court below said that the case against Berger was not strong; and from a careful examination of the record we agree. Indeed, the case against Berger, who was convicted only of conspiracy and not of any substantive offense as were the other defendants, we think may properly be characterized as weak—depending, as it did, upon the testimony of Katz, an accomplice with a long criminal record.

In these circumstances prejudice to the cause of the accused is so highly probable that we are not justified in assuming its nonexistence.

Berger, supra at 88-89.

If one replaces the name of defendant Berger with defendant-appellant Burse and the name of government witness Katz with government witness DeBose, this passage is a perfect description of the facts in the instant case.

It should go without saying that successful—even zealous—prosecution does not require “improper suggestions, insinuations and, especially, assertions of personal knowledge.” *Berger, supra* at 88. However, that is a lesson which was ignored below.

On the facts of this case, reversal is required.

III. OTHER CLAIMS ON APPEAL

In addition to the arguments discussed above, appellant Burse asserts two other bases for reversal which we feel compelled to address. First, Burse argues that an in-court identification of him made by Mrs. Anna DeBose, mother of government witness Darrell DeBose, was the result of an earlier, impermissively suggestive photo identification procedure. Second, Burse argues that the indictment on which he was convicted was based on improper hearsay evidence.

While we do not sustain the position of the appellant on these two points, we do believe that there is sufficient merit to these contentions to warrant brief comment.

It is, of course, settled law that in-court identifications are inadmissible when they stem from photo identification procedures so impermissively suggestive as to give rise to a very substantial likelihood of irreparable misidentification. *Simmons v. United States*, 390 U.S. 377 (1968). Such impermissible procedures have been of particular concern to this court. *Braithwaite v. Manson*, — F.2d — (2d Cir., Nov. 20, 1975), slip op. at 595.

From the record below, it appears that Mrs. DeBose may have been shown two pictures of prospective defen-

dants other than her son. Because of the independent basis which existed for Mrs. DeBose's identification, the alleged facts of this case would not establish grounds for reversal under *Simmons* and *Braithwaite*. However, they come disturbingly close. There is no justification for photo identification procedures which put before the witness so few pictures.

Similarly, we reject Burse's argument that the hearsay-based indictment on which he was convicted is invalid under *United States v. Estepa*, 471 F.2d 1132 (2d Cir. 1972). However, this contention is also one which cannot be dismissed lightly.

This court has repeatedly indicated that indictments based on hearsay are disfavored and that it is preferable for grand juries to be presented with first-hand evidence. *United States v. Catino*, 403 F.2d 481 (2d Cir. 1968); *United States v. Umans*, 368 F.2d 725 (2d Cir. 1966).

While there are instances where it is justified to present hearsay evidence to the grand jury, the record from the court below fails to disclose any valid reason why the grand jury which indicted Burse could not have been given first-hand testimony. The use of hearsay under such circumstances inevitably creates questions which, if possible, are best avoided.

Reversed and remanded.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

Plaintiff

-VS-

CR-74-227

MAURICE BURSE,

Defendant

On October 2, 1975 the jury found the defendant not guilty on Counts II and III of this indictment, but guilty on Count I, which charged him with conspiracy. On March 8, 1976 the Second Circuit reversed the conspiracy conviction, United States v. Burse, Docket No. 75-1388. The reversal was granted because the court had failed to give a requested alibi instruction and because of the prosecutor's prejudicial and inflammatory closing argument. The defendant now seeks dismissal of the indictment on the grounds that a retrial is barred by the fifth amendment double jeopardy clause. The jury verdict on Counts II and III bars a retrial on those counts. Green v. United States, 355 U.S. 184 (1957).

Citing United States v. Kessler, 530 F.2d 1246 (5th Cir. 1976), and United States v. Jorn, 400 U.S. 470

(1971), the defense asserts that prosecutorial misconduct bars a retrial of the defendant on the conspiracy count as well. In United States v. Kessler, supra, at 1256, the court stated:

To find "prosecutorial over-reaching," the Government must have, through "gross negligence or intentional misconduct," caused aggravated circumstances to develop which "seriously prejudice[d] a defendant" causing him to "reasonably conclude that a continuation of the tainted proceeding would result in a conviction." United States v. Dinitz, supra, ____ U.S. ____, 96 S.Ct. at 1080, 47 L.Ed.2d at ____, 44 U.S.L.W. at 4312.

A prosecutor will not be allowed to save a weak case through improper tactics, inflammatory arguments, twisting of facts and implication that the defendant should offer an explanation. In this case, there is a strong argument that the relief sought by the defendant should be granted. Because the court had ruled that the Government was not entitled to an aiding and abetting charge on the substantive counts, the prosecutor was aware that he had a difficult task to persuade the jury to convict on those counts. There was no direct evidence that defendant Burse was in the bank and only circumstantial evidence

pointed to the conclusion that, at the time of the alleged robbery, Burse was in the company of defendants DeBose and Green. The tactics used by the prosecutor in this case will not be permitted. Other circuits have strongly condemned similar tactics. United States v. Wiley, 534 F.2d 659 (6th Cir. 1976), and United States v. Leon, 534 F.2d 667 (6th Cir. 1976). In those cases convictions were reversed because of prosecutorial misconduct. However, in this case, the reversal was occasioned not only by the prosecutorial misconduct, but also because of failure of the court to give the requested alibi instruction. Furthermore, there is a difference between this case and those cited by defendant in support of his motion.

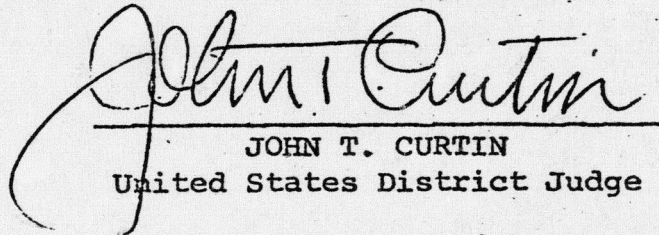
As the Supreme Court pointed out in United States v. Jorn, supra, at 48':

. . . the crucial difference between re-prosecution after appeal by the defendant and re-prosecution after a sua sponte judicial mistrial declaration is that in the first situation the defendant has not been deprived of his option to go to the first jury and, perhaps, end the dispute then and there with an acquittal.

In the Burse case, the defense motion for mistrial was denied and the case went to the jury.

The motion of defendant to dismiss Count I is denied. A meeting of counsel is set for August 17, 1976 at 9:00 a.m.

So ordered.



JOHN T. CURTIN
United States District Judge

DATED: August 9, 1976

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

Plaintiff

-vs-

CR-74-227

MAURICE BURSE,

Defendant

After this case was returned to the district court, I first considered and denied a motion by the defendant to dismiss Count I of the indictment on a double jeopardy ground. The defendant now urges that the testimony of Mrs. DeBose identifying defendant Maurice Burse be suppressed. The court has reread the testimony at the hearing conducted at trial, the briefs on appeal to the Court of Appeals for the Second Circuit and the decision of the Circuit Court. This point was argued on appeal and Judge Smith, writing for the court, rejected the argument. He said:

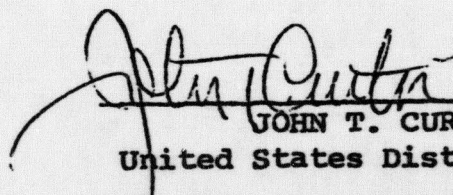
Because of the independent basis which existed for Mrs. DeBose's identification, the alleged facts of this case would not establish grounds for reversal under Simmons and Braithwaite. However, they come disturbingly close.

There is no justification for photo identification procedures which put before the witness so few pictures. United States v. Burse, Slip op., Docket #75-1388 (2d Cir., March 8, 1976), at 2515.

On the present state of the record, the motion of defendant is denied.

Since the time of the remand, several opportunities have been afforded to defense counsel to obtain additional information on the manner in which the photographs were exhibited to Mrs. DeBose. The court is willing to consider any further evidence on this point. However, further delay of retrial is not warranted. For the present, the motion of defendant is denied. Retrial of this case is set for December 14, 1976. I find that the delay caused by the consideration of the motions was made with the consent of the defendant and was in the public interest.

So ordered.


JOHN T. CURTIN
United States District Judge

DATED: November 15, 1976

CHARGE OF THE COURT

THE COURT:

Ladies and gentlemen, it is now my obligation to charge you on the law which applies in this case and it is your job to try to understand the charge I give to you and apply it to the facts which you derive from the witnesses testimony and the exhibits. That is, the charts and photographs which also will be sent to you in the jury room. You may use those, certainly, in checking back on the testimony of the witnesses to determine whether the witnesses could be in a position to testify about what they did tell us about, whether they were close, whether they were far away or in any other common sense reasonable way in which you usually would use diagrams or charts.

This case, when you take it to the jury room, you must remember that before you can find a verdict of guilty here, you must be convinced beyond a reasonable doubt of the guilt of the defendant of

1 the particular crime charged here in
2 this indictment. The fact that Mr.
3 Darrell DeBose and Gary Green have been
4 found guilty by plea or otherwise makes
5 no difference at all because in any
6 instance what the evidence might be
7 against Defendant "A" does not mean that
8 the same evidence applies to Defendants
9 "B" or "C", so the mere fact that they
10 have been found guilty is absolutely no
11 evidence of any criminal conduct on the
12 part of Maurice Burse.

13 The fact again that Mr. Burse has
14 been charged here in an indictment may
15 not be considered by you as any evidence
16 of criminal conduct on his part. He is
17 presumed innocent. That presumption
18 remains with him throughout the course
19 of the trial and cannot be overcome
20 until you are satisfied beyond a reason-
21 able doubt by unanimous vote that he is
22 guilty of the crime charged and you so
23 announce your verdict in open court.
24 Then and only then is this presumption
25 overcome.

1 This particular case, I will read
2 to you the conspiracy charge which he
3 is charged with and necessarily when I
4 read it, I will also mention the other
5 names here, but again, keep in mind that
6 it has nothing to do with his guilt or
7 innocence. Conspiracy means that I must
8 conspire with one or more other indivi-
9 duals. A person cannot conspire with
10 himself alone, so necessarily, it means
11 in any conspiracy charge that there must
12 be more than one charged. The charge is
13 that on or about July 30, 1974, at
14 Lackawanna, New York, that the defendant
15 and Darrell DeBose did unlawfully,
16 willfully and knowingly conspire and
17 agree together and with Gary Green, a
18 juvenile not named as a defendant, to
19 commit certain acts in violation of
20 Title 18, United States Code,
21 Section 2113(b). That is, to knowingly,
22 willfully and unlawfully rob the
23 Manufacturers and Traders Trust Company,
24 Ridge Road office, Lackawanna, New York,
25 the deposits of which were then and are

1 insured by the Federal Deposit Insurance
2 Corporation.

3 The charge also contains a number
4 of overt acts which we will discuss as
5 to the meaning of overt acts as we go
6 along on this particular indictment.
7 That is, first, on or about July 30,
8 1974, at Buffalo in the Western District
9 of New York, the defendants Maurice
10 Burse, Darrell DeBose and Gary Green,
11 a juvenile not named as a defendant,
12 met together and with each other.

13 Secondly, that on or about the
14 30th of July, 1974, at Lackawanna,
15 Darrell DeBose entered the Manufacturers
16 and Traders Trust Company, Ridge Road
17 office, Lackawanna, New York and took
18 and carried away the sum of about \$410
19 from the bank.

20 Thirdly, that on the same day, at
21 40 Steelawanna Street, Lackawanna, in
22 the Western District, the defendants
23 and Gary Green, a juvenile not named,
24 met together and split the approximately
25 \$410 taken from the Manufacturers and

Traders Trust Company.

The conspiracy statute under Section 371 provides that if two or more persons conspire to commit any offense against the United States and one or more of such persons does any act to effect the object of the conspiracy, each is guilty of an offense against the United States. In order to convict the defendant on the conspiracy count in this indictment, the Government must prove to your satisfaction beyond a reasonable doubt, each of the three following elements. The existence of a conspiracy for the purpose of willfully, knowingly and intentionally robbing the M&T Bank, Ridge Road Office in Lackawanna, New York.

Secondly, that the defendants joined the conspiracy with knowledge of its unlawful purpose.

Thirdly, that any one of the conspirators committed at least one overt act in furtherance of the objects of the conspiracy.

1 What is a conspiracy. A conspiracy
2 is a combination or agreement among two
3 or more people to violate the law as
4 charged in this count of the indictment.
5 That is, in this case an agreement to
6 rob the M&T Bank or the particular branch
7 charged in the indictment.

8 A conspiracy is a kind of partner-
9 ship with a criminal purpose. The gist
10 of the crime is the agreement to violate
11 the law. This does not mean that two
12 or more persons must meet and sign a
13 formal partnership agreement or that
14 they must sit down and agree in so many
15 words on what their unlawful plan or
16 scheme is to be or how they are to carry
17 it out.

18 The first element is satisfied if
19 you find, beyond a reasonable doubt, that
20 any two or more people in any way, -
21 that is, the people mentioned in the
22 indictment including the defendant in
23 this case Maurice Burse, formed an agree-
24 ment intentionally with a common plan to
25 rob the bank in Lackawanna.

1 A conspiracy may be found to exist,
2 although the purpose of the conspiracy
3 is never accomplished but the fact that
4 if you believe beyond a reasonable doubt
5 that it was accomplished, certainly
6 that is solid evidence that there was
7 an agreement. It is most important,
8 however, that simply the fact that you
9 find there was an agreement does not mean
10 that the defendant can be charged with
11 the agreement. You must find that he,
12 in some way, knowingly knew what the
13 conspiracy was about and knowingly
14 entered into an agreement with the others
15 to do the acts charged in the indictment.

16 The second element which the
17 Government is required to prove beyond
18 a reasonable doubt is the defendant
19 joined the conspiracy with knowledge of
20 its unlawful purpose. To join a con-
21 spiracy does not mean that the defend-
22 ant has to apply for some kind of
23 membership. Before one can be found to
24 be a conspirator, however, he must know
25 about the conspiracy and of its unlawful

1 purpose and voluntarily and knowingly
2 join in the criminal venture with an
3 intent to combine with others in viola-
4 tion of the law. He must knowingly
5 promote the scheme or have some kind of
6 stake in its outcome. One may become
7 a member of a conspiracy without knowing
8 all of the details or all of the opera-
9 tions of the conspiracy. One member
10 may know only one other member of the
11 conspiracy. Yet, if he knowingly
12 cooperates to further the illegal purpose
13 of the conspiracy with knowledge that
14 others have combined to violate the law,
15 he becomes a member. If you find that
16 a defendant did join the conspiracy then
17 he is bound by what others say and do
18 to promote and further the venture
19 even though he himself is not present.
20 This is so because each conspirator is
21 the agent or partner of every other
22 conspirator. Keep in mind that unless
23 you are a knowing member of a conspiracy
24 you cannot be charged with what others
25 do. It is only when you become a knowing

1 member of a conspiracy, - that is, you
2 know what it is about and you form the
3 willful intention to become part of the
4 conspiracy then can you be charged with
5 what others may do to carry out its
6 purposes.

7 The third element of the crime of
8 conspiracy is the commission by any
9 conspirator of at least one overt act
10 in furtherance of the object of the
11 conspirator. An overt act means an
12 act by any member of the conspiracy in
13 an effort to accomplish some purpose of
14 it. The reason the law of conspiracy
15 requires an overt act is because a
16 person might agree to commit a crime
17 and then change his mind. Therefore,
18 before a defendant can be convicted
19 of the crime of conspiracy, one or more
20 of the conspirators must have taken at
21 least one step or performed one single
22 act which moves toward carrying out the
23 unlawful intent to carry out the crime.
24 Furthermore, if two or three people sit
25 around the kitchen table and hatch some

1 scheme to rob a bank or do some other
2 criminal act over a cup of coffee and
3 then upon further reflection decide that
4 it was not the thing to do and do nothing
5 further beyond talk about it, certainly
6 those people should not be charged nor
7 convicted of any criminal conduct.

8 If the overt acts were performed by
9 any member of the conspiracy, whether
10 or not he is the defendant on trial and
11 those acts were performed during the
12 existence of the conspiracy and in fur-
13 therance of its purpose, then those
14 acts are sufficient to satisfy the third
15 requirement.

16 The Government is not required to
17 prove that each of the overt acts
18 alleged was committed. It is sufficient
19 if the Government proves beyond a reason-
20 able doubt that at least one of the
21 overt acts charged was committed in
22 furtherance of the conspiracy by one or
23 more members of the conspiracy.

24 In this case, ladies and gentlemen,
25 you have heard about, - the charge is

1 that the defendants agreed or conspired
2 to violate the bank robbery statute.
3 Section 2113 provides that it is a
4 Federal crime for any individual to rob
5 or steal from a bank whose deposits are
6 insured by the Federal Deposit Insurance
7 Corporation.

8 In this case, the Government is
9 required to prove that as an element of
10 its case, that indeed the bank was, the
11 deposits were insured by the Federal
12 Deposit Insurance Corporation and you
13 will remember that there was testimony
14 about that from one of the bank officers.
15 It is a question of fact, however, for
16 you to determine.

17 The Government is not required to
18 prove beyond a reasonable doubt that the
19 particular amount, - that is, \$410 was
20 stolen. It is not necessary that the
21 Government prove this precise amount.
22 It is sufficient, in this case, we are
23 talking about a conspiracy, not the
24 actual amount which was set forth here
25 was taken.

1 There are some general considera-
2 tions which you should take into account
3 in making your determination here.

4 Some of the instructions I give you may
5 be repetitious, but they are all impor-
6 tant for your consideration. First of
7 all, it is most important that you care-
8 fully deliberate when you go to the
9 jury room, that you consider the thoughts
10 and suggestions of your fellow jurors
11 conscientiously given, reasonably given
12 and you must give your own careful
13 suggestions to your fellow jurors. None
14 of these suggestions should, of course,
15 be made upon information which you
16 received from other sources or from
17 newspaper accounts of other criminal
18 activities. As I have explained to you
19 before, we are not here as social
20 reformers so general considerations of
21 law and order should not apply to your
22 decision here. We are here to determine
23 one thing only, whether or not on the
24 particular time charged in the indictment
25 the defendant here, Maurice Burse did

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1 conspire with these other individuals
2 to rob the bank in Lackawanna. The
3 Government has the duty of proving that
4 beyond a reasonable doubt.

5 It is your job to determine whether
6 or not the witnesses have testified
7 truthfully in this case and how their
8 testimony applies one with the other.
9 The Government does not have to prove
10 that the testimony of each witness was
11 believable beyond a reasonable doubt.
12 Witnesses may be, - some witnesses may
13 be inaccurate. Other witnesses may be
14 untruthful. The question is when you
15 take all the information together,
16 has the Government proven its case
17 beyond a reasonable doubt.

18 Sometime during the course of the
19 trial, the lawyers have made objections
20 to questions. That is their right.
21 As a matter of fact, it is their duty,
22 sometimes, to do that. I have made
23 rulings. If I have said the testimony
24 may be considered, you may consider it.
25 If I have ordered the testimony stricken,

1 you should not consider it. Certainly,
2 you should not, in any way, penalize
3 either side because you believe some of
4 the objections made were not well taken
5 or well phrased. That is the right of
6 the lawyer to make the objection and
7 no criticism by you should be made of
8 the attorney for carrying out his
9 obligation.

10 It is your judgment on the facts
11 which control. If, in their discussion,
12 either Mr. Williams or Mr. Stephens
13 made some argument which you find is not
14 supported by the testimony of the
15 witnesses, then you just will consider
16 what the witnesses testified to.

17 It is important that each of you
18 ladies and gentlemen determine the facts
19 in this case from the testimony and from
20 the testimony and the exhibits only, and
21 not from any other source. It is most
22 important that you take the charge on
23 the law which I give to you and take it
24 from me and not get it from some general
25 reading you have done or from any other

1 source. You have been chosen and sworn
2 as jurors in this case to try the issues
3 of fact presented by the allegations in
4 the indictment and the denial made by
5 the not guilty plea of the accused.
6 You are to perform this duty without
7 bias or prejudice to any party. The law
8 does not permit you to be governed by
9 considerations of sympathy, prejudice or
10 public opinion. Both the accused and
11 the public expect that you will care-
12 fully and impartially consider all the
13 evidence in the case, follow the law as
14 I state it to you and reach a just
15 verdict regardless of the consequences.

16 In any kind of a case such as this,
17 there are two types of evidence from
18 which you may properly find a defendant
19 guilty or not guilty. One is direct
20 evidence such as the testimony of an
21 eye witness. The other is circumstantial
22 evidence, the proof of a chain of circum-
23 stances pointing to the commission of
24 an offense. The law makes no distinction
25 between direct and circumstantial evidence

1 but simply requires that before convict-
2 ing a defendant, the jury be satisfied
3 of the defendant's guilt beyond a reason-
4 able doubt from all the evidence in the
5 case.

6 As I have told you before, state-
7 ments and arguments of counsel are not
8 evidence. We may have had, in this
9 case, a stipulation of some facts and if
10 that is the case, you may accept the
11 stipulation made between the parties
12 as evidence, however.

13 While I have told you that you are
14 to consider only the evidence in the
15 case, in your consideration of that
16 evidence, you are not limited simply to
17 the bald statements made by the witnesses.
18 In other words, you are not limited
19 solely to what you see and hear as the
20 witnesses testify. You are permitted to
21 draw from facts which you find have been
22 proven such reasonable inferences as you
23 feel are justified in the light of
24 experience, but when we get into these
25 kind of things, we talk about inferences,

1 we talk about circumstantial evidence,
2 it is most important that you keep in
3 mind that when you start considering
4 circumstantial evidence, start making
5 inferences, taking inferences from the
6 testimony given that they must be
7 reasonable, they must be based upon
8 common sense and if there are inferences
9 which may be on the one hand in a reason-
10 able fashion, point to innocence and in
11 a reasonable fashion, on the other hand,
12 point to guilt, then keeping in mind the
13 overriding obligation of the Government
14 to prove guilt beyond a reasonable doubt,
15 then you must accept the reasonable
16 inference pointing to innocence.

17 I do not think that this is in the
18 case at all here, but you certainly must
19 keep in mind that the defendant is only
20 on trial for this particular charge.
21 He is not on trial for any other act
22 or conduct not alleged in the indictment.

23 Perhaps during the course of the
24 trial I asked certain questions of
25 witnesses or maybe I made some comment

1 or suggestion. That does not mean,
2 certainly, that I have an opinion one
3 way or another on the matters to which
4 I put questions. At all times, you
5 ladies and gentlemen are at liberty to
6 disregard any comment that I made about
7 the facts in the case. In this charge,
8 I may have to comment upon some of the
9 facts in the case. I do not mean to
10 indicate that you should find facts one
11 way or another. It would only be here
12 as an aid to you in helping you arrive
13 at your verdict.

14 As I have told you before, the law
15 presumes a defendant to be innocent of
16 the crime charged. The law permits
17 nothing but legal evidence to be pre-
18 sented before you to be considered in
19 support of any charge against him. The
20 presumption of innocent alone is suffi-
21 cient to acquit a defendant unless you
22 are satisfied beyond a reasonable doubt
23 of the defendant's guilt after careful
24 and impartial consideration of all of
25 the evidence in the case. It is not

1 required that the Government prove
2 guilt beyond all possible doubt. The
3 test is one of reasonable doubt.

4 A reasonable doubt is a doubt based
5 upon reason and common sense, the kind
6 of doubt that would make a reasonable
7 person hesitate to act in a matter of
8 importance to himself. Proof beyond a
9 reasonable doubt must, therefore, be
10 proof of such a convincing character
11 that you would be willing to rely and
12 act upon it unhesitatingly in matters of
13 most importance to yourself.

14 You should keep in mind that a
15 defendant is not to be convicted on
16 suspicion, conjecture or surmise or
17 anything along that line. The burden
18 remains with the prosecution to prove
19 guilt beyond a reasonable doubt. It
20 never shifts to the defendant. The law
21 never imposes upon a defendant in a
22 criminal case the burden or duty of
23 calling any witnesses or producing any
24 evidence.

25 In this case, the defense chose to

1 put some witnesses on, but they were not
2 obliged to. A reasonable doubt exists
3 whenever, after careful and impartial
4 consideration of all the evidence in the
5 case, you do not feel convinced beyond
6 a reasonable doubt that a defendant is
7 guilty of the crime charged so if you
8 feel the evidence in the case as reasonably
9 permitting either of two conclusions,
10 one of innocence, the other of guilt, you
11 should and must consider and adopt the
12 conclusion of innocence.

13 In this case, the defendant Maurice
14 Burse chose not to take the stand. That
15 is his absolute right. You may not, in
16 any way, consider this factor against
17 him in any respect. His failure to take
18 the stand may not be commented upon by
19 you as jurors and you privately may not
20 consider it against him in any fashion.
21 This is his absolute right not to take
22 the stand and you may not penalize him
23 for it in any fashion.

24 Let me explain to you reasonable
25 doubt in slightly a different way. Some

1 of this may again be repetitious, but
2 I think it is important to consider.
3 A reasonable doubt may arise not only
4 from the evidence produced in the case,
5 but also from the lack of evidence.
6 Since the burden is upon the prosecution
7 to prove the accused guilty beyond a
8 reasonable doubt of every essential
9 element of the crime charged, a defend-
10 ant has the right to rely upon failure
11 of the prosecution to establish such
12 proof. A defendant may also rely upon
13 evidence brought out on cross examination
14 of witnesses for the prosecution. The
15 law does not impose upon the defendant
16 the duty of producing any evidence.

17 A reasonable doubt is such a doubt
18 as is based upon reason and appeals to
19 your power of logic. It is a doubt
20 arising out of something tangible in
21 the evidence in the case or something
22 lacking in it. It is to be distinguished
23 from a doubt which may be based upon an
24 emotion or as I said to you before,
25 guesswork, speculation. If there is

1 not evidence upon a certain subject in
2 the case, you should not guess at what
3 a particular witness would testify about
4 if he is not here.

5 If you feel uncertain and not fully
6 convinced that a defendant is guilty of
7 the crime charged and you believe you
8 are acting in a reasonable manner and
9 you believe a reasonable man or woman
10 in any matter of like importance would
11 hesitate to convict because of such a
12 doubt as you have, that is a reasonable
13 doubt to the benefit of which the
14 defendant is entitled. If you have
15 such a doubt, you must acquit.

16 The rule that the Government must
17 prove every essential element of the
18 crime beyond a reasonable doubt does
19 not mean that you must believe the
20 testimony of every Government witness
21 as being true beyond a reasonable doubt
22 or that every piece of evidence that
23 they have offered is true beyond a
24 reasonable doubt. It means that the
25 credible evidence as weighed and found

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by you under instructions which I have given to you and as viewed as a whole must establish every essential element of the crime and a defendant's guilt beyond a reasonable doubt.

In this case, certainly, to determine, as in any case, to determine what the facts are, you determine that essentially and mainly from the testimony of the witnesses in the case. You may, in considering the testimony of any witness in the case, you may consider any bias or prejudice demonstrated by the witness or demonstrated hope of leniency or reward. You should consider the witness' intelligence, motive, state of mind, demeanor or manner while on the stand. You may consider any relationship the witness may bear to either side of the case; the manner in which the witness might be affected by the verdict and the extent to which, if at all, the witness is either supported or contradicted by other evidence or the lack of other evidence in the case..

1 The mere fact that the testimony of a
2 witness is inconsistent or that there
3 are discrepancies in such testimony
4 does not mean that you must reject the
5 witness' credibility. You must deter-
6 mine whether the inconsistency or dis-
7 crepancy is the result of falsification
8 or whether, on the other hand, it is the
9 result of innocent miscalculation or
10 inaccurate observation.

11 If you find that any witness has
12 lied with respect to any material por-
13 tion of his or her testimony, you may
14 disregard that portion which you find
15 to be unbelievable, or you may, if you
16 desire, disregard the entire testimony
17 of the witness. In this regard, you may
18 conclude that a witness who would
19 willingly testify falsely is not worthy
20 of belief with respect to any of his or
21 her testimony. In evaluating credibility,
22 you will, of course, determine whether
23 or not the testimony of a given witness
24 is inherently improbable or contradictory
25 in view of the other evidence in the case.

1 In this case there has been some
2 testimony, for example, Barbara Ramos
3 told us about the events which occurred
4 when some young men ran by her as she
5 was coming down the steps. In evaluating
6 her testimony or the testimony of any
7 others who testified about activities,
8 for example, around the bank, you should
9 keep in mind whether at the period of
10 time it was light or dark, whether there
11 were other things which would distract
12 the witness, whether the witness was
13 in a position to see and hear what he
14 testified to that he did see or hear.
15 Certainly, the kind of identification
16 testimony generally you must approach it
17 with great care and caution. We all
18 know in our own experience how difficult
19 it is to see a person for an instant
20 and then identify him or her at a later
21 period of time so that you should
22 carefully consider any identification
23 testimony given in this case to determine
24 whether or not it is actually and care-
25 fully and accurately given.

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1 In this case also there are certain
2 witnesses whose testimony you must, -
3 you may accept only after you have given
4 it special careful scrutiny. Certainly,
5 the testimony of such a person as
6 Darrell DeBose and Evon Wright. By their
7 own admission here, they are what we
8 would call accomplices. That is, a
9 person who admits the commission of a
10 crime. In Darrell DeBose's case it is
11 clear that he admitted that he was the
12 person who went in and robbed the bank.
13 The testimony of a person like that must
14 only be accepted by you after special
15 care and scrutiny.

16 In the case of Evon Wright, her
17 participation is certainly not as heavy
18 a one or as high a one or as serious a
19 one as that of Darrell DeBose, but she
20 did admit receiving money from Darrell
21 DeBose and she did admit lying to the FBI
22 so that as far as her testimony is con-
23 cerned, you should only receive it after
24 giving it special care and caution.

25 You should never convict a defendant, -

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a defendant in any criminal case is not to be convicted upon the unsupported testimony of an alleged accomplice unless you believe that unsupported testimony beyond a reasonable doubt.

As I have told you before, you are the sole judge of the credibility of the witnesses who have testified here. You should keep in mind not only the direct evidence given by the witness, but also the cross examination. You should carefully scrutinize the circumstances under which the witness testified, the motive which each witness may have for testifying and every matter in evidence which tends to indicate whether the witness is worthy of belief.

In this case, we have the circumstance which again is for you to determine what the facts were about this, but we do have the testimony of Evon Wright. Considering her relationship with Kenneth Burse, the brother of the defendant Maurice Burse in this case, whether or not she was trying to hide something, whether or not

1 she was trying to protect Kenneth Burse,
2 those are considerations for you to take
3 into account, but if you believe she was
4 and you believed that her consideration
5 for Kenneth Burse led her to testify
6 untruthfully, certainly, you may take
7 that into consideration in weighing
8 her testimony, weighing her credibility
9 in this case.

10 She testified about the events
11 which occurred when the FBI agents came.
12 If you believe that she lied to the FBI
13 at that time, again, that is a considera-
14 tion you may take into account in
15 determining whether or not she was
16 truthful when she testified on the stand.

17 There are several other considera-
18 tions which you should keep in mind in
19 considering the testimony of Darrell
20 DeBose. Mr. Stephens has, in detail,
21 argued this to you, but certainly, a
22 person who has lied before when he was
23 in a judicial setting, when questioned
24 by a judge or some representative of
25 the judge in court, if he lied then, you

1 may take that into consideration in
2 determining whether or not he is telling
3 the truth now. The fact that he has been
4 convicted on a prior occasion for robbery
5 which he admitted here in open court,
6 whether that is the kind of person
7 whose testimony you should rely upon is
8 a consideration for you to make. Whether
9 or not he has any hope of any further
10 reward here, if you believe that any
11 hope of further reward or consideration
12 colored his testimony in any fashion,
13 slanted it in any way to the detriment
14 of the defendant here, you may take those
15 facts into consideration as well. Again,
16 testimony of a person such as Darrell
17 DeBose should always be considered with
18 caution and weighed with great care.

19 The testimony of any witness may
20 be discredited or impeached by showing
21 that on a prior occasion, he made state-
22 ments which are inconsistent with his
23 present testimony, his or her present
24 testimony. The earlier contradictory
25 statements are admissible only to impeach

1 the credibility of the witness and not
2 to establish the truth of these statements.
3 It is your province to determine the
4 credibility and how much weight is to be
5 given to the testimony of any witness.

6 In this case, as I have told you
7 before, and perhaps it is out of place,
8 but it is important, it is an element
9 here that the Government prove, beyond
10 a reasonable doubt that, first of all,
11 there was a conspiracy, and secondly,
12 that the defendant here knowingly entered
13 the conspiracy knowing what the plan was.
14 Knowing means that it was intentional,
15 that it was willful, it was deliberate,
16 it was not by mistake or not by gross
17 negligence. That is not sufficient.
18 You must find that the defendant's
19 conduct was deliberate.

20 You are not obliged to accept testi-
21 mony even though the testimony is
22 uncontradicted and the witness is not
23 impeached. You may decide because of
24 the witness' bearing or demeanor or
25 because of the inherent improbability

1 of his testimony or for other reasons
2 sufficient to you that such testimony
3 is not worthy of belief. On the other
4 hand, the Government is not required to
5 prove the essential elements of the
6 offense as defined in these instructions
7 by any particular number of witnesses.
8 The testimony of a single witness may be
9 sufficient to convince you beyond a
10 reasonable doubt of the existence of an
11 essential element of the offense charged
12 if you believe beyond a reasonable doubt
13 that the witness is telling the truth.

14 As I have said to you before, in a
15 different way, the evidence in this case
16 raises the question of whether the
17 defendant was, in fact, the criminal
18 actor and necessitates resolving any
19 conflict or any uncertainty in testimony
20 on that issue. The burden of proof is
21 on the prosecution with reference to
22 every essential element of the crime
23 charged and this burden includes the
24 burden of proving beyond a reasonable
25 doubt the identity of the defendant of

1 the perpetrator of the crime charged.
2 That is, the conspiracy as I have ex-
3 plained it to rob this particular bank.
4

5 In this case, evidence has been
6 introduced tending to establish an
7 alibi. That is, that the defendant was
8 not involved in this particular bank
9 robbery, that while the Government's
10 theory is that at the time of the robbery
11 he was there on the scene, that he was
12 a participant, that he helped plan the
13 robbery ahead of time. The defendant
14 has offered evidence here that at the
15 time the robbery occurred, he was not
16 there. That is what is known as an
17 alibi which amounts to a contention that
18 the defendant was not present at the
19 time when, or at the place where he is
20 alleged to have committed the offense
21 charged in the indictment. If, after
22 consideration of all the evidence in the
23 case, you have a reasonable doubt as to
24 whether the defendant was present at the
25 time and place the alleged offense was

1 committed, you must acquit him. The
2 jury will always bear in mind that the
3 law never imposes upon a defendant in
4 a criminal case the burden or duty of
5 calling any witnesses or producing any
6 evidence. Certainly, in this case, the
7 Government has the burden of proving
8 beyond a reasonable doubt that Maurice
9 Burse was present at the scene of the
10 bank robbery under the particular facts
11 and under the particular theory of this
12 case.

13 In this case, you will also keep
14 in mind that Mrs. DeBose testified about
15 a certain photographic identification
16 procedure which occurred shortly after
17 this particular bank robbery. As to
18 what happened, as to how many agents
19 came to see her, or when they came to
20 see her or whether her husband was
21 present or not present, that is for you
22 to determine.

23 It is important to keep in mind,
24 however, the law prohibits the use of a
25 photographic identification procedure

1 that is called impermissibly suggestive.
2 That is, when the procedure used gives
3 rise to a very substantial likelihood
4 of irreparable misidentification. What
5 do we mean by those, - these are sort of
6 long words the Courts have adopted to
7 prohibit the use of certain techniques.
8 Let us assume that shortly after any
9 criminal venture, a police officer comes
10 to you and shows you my picture and says
11 something along the lines, "That is the
12 fellow, isn't it, that held you up".
13 The thought certainly would be in your
14 mind unless, if the person shown in the
15 picture was white and the person who
16 held you up is black, you might then say,
17 "No, that is certainly not the case",
18 but if he looked anywhere like him at
19 all as far as physique and so forth,
20 the temptation is, and the history is,
21 in these cases, that in all likelihood
22 the witness may say "Yes, that certainly
23 looks like him", because in his mind
24 "The policeman wouldn't come to me with
25 this photograph unless he knew that this

1 was, indeed, the perpetrator of the
2 crime charged", so the showing of, -
3 there are other circumstances, but
4 certainly, the showing of one person
5 to a witness and saying "Is this the
6 person that did thus and so", that is
7 an improper identification procedure and,
8 furthermore, if the officer would say,
9 "This is the picture", in this case,
10 "of Maurice Burse", that certainly would
11 be considered as an impermissible identi-
12 fication procedure. In this instance,
13 without rehashing all of the testimony
14 of Mrs. DeBose and the FBI agent who
15 came by and testified about showing
16 certain pictures, it comes to this, if
17 you credit the testimony of Mrs. DeBose
18 that three or four pictures were shown
19 to her including a picture of the defend-
20 ant Maurice Burse, which she could not
21 identify and her further testimony about
22 the statement of the FBI agent that it
23 was Maurice Burse who robbed the bank,
24 then I charge you that the procedure
25 was impermissibly suggestive and you

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1 may not consider her testimony regarding
2 identification in reaching your verdict.
3 If, on the other hand, you believe the
4 testimony of the Special Agent that
5 only one picture of the man robbing the
6 bank was shown to her and that was the
7 picture of her son and no statement was
8 made concerning Maurice Burse, then you
9 may consider the testimony of Mrs. DeBose
10 regarding identification in reaching your
11 verdict.

12 The other thing is, it is up to
13 you to determine what the testimony was,
14 but Mrs. DeBose, it is her judgment which
15 must control, she cannot rely,- there was
16 some testimony about she knew it was
17 Maurice because her son told her it was
18 Maurice. Certainly, her judgment in
19 that regard would not be any better.
20 You would have to rely upon that of
21 Darrell DeBose, so when she comes here
22 into court and if her judgment now is
23 that this must be the man who was there,
24 "I am not sure, in my own mind, but I
25 rely upon my son", you should reject
her testimony. She also testified, as

1 I recall at one point, and it is your
2 recollection which controls, that she
3 saw something in the newspaper about the
4 fact that it was Maurice Burse. If she
5 is making something up in her mind now,
6 not because of her firm belief and
7 recollection made upon her own thought
8 processes that Maurice Burse was, in
9 fact, the young man that was there that
10 morning with her son, but she got that
11 information out of the newspaper and she
12 relies upon the newspaper, certainly,
13 you should reject her testimony as to
14 identification.

15 As far as witnesses are concerned,
16 if you find, - well, it is within the
17 special power of either the prosecution
18 or the defense to produce a witness
19 who could give material testimony on
20 any issue in the case, failure to call
21 that witness may give rise to an inference
22 that his testimony would be unfavorable
23 to that party. However, no such con-
24 clusion should be drawn by you with
25 regard to a witness who is equally

1 available to both parties or where the
2 witness' testimony would be merely
3 cumulative. You will keep in mind that
4 Mr. Stephens, - you should keep this in
5 your consideration when you consider
6 whether or not the Government has the
7 duty of calling the agent, I believe it
8 was Colombell, who was there with Agent
9 Davidson when the pictures were shown.
10 The agent, certainly, is within the
11 power of the prosecution to call under
12 their control and if you find that there
13 is some special information which you do
14 not have because of the failure of the
15 Government, not to call him, then you
16 may consider an inference that his testi-
17 mony would be unfavorable to the Government.
18 In the same way, as far as Gary Green is
19 concerned, if his testimony, you believe,
20 is important to your consideration, then
21 he is also a witness who is, the inference
22 may arise because of failure to call.

23 Simply because the officer had, if
24 you believe that the officer had pictures
25 and had pictures of Maurice Burse at the

1 time should not be taken in any way as
2 an unfavorable inference to the defendant.
3 The police have many sources of obtain-
4 ing pictures. Simply because a police
5 officer or an FBI Agent has a person's
6 picture, does not mean that that person
7 was guilty of the crime charged or may
8 not be considered of any evidence of
9 guilt of the crime charged here at all.

10 On the other hand, the law does not
11 require the prosecution to call as
12 witnesses all persons who may have been
13 present at any time or place involved
14 in this case or who may appear to have
15 some knowledge of the matters at issue
16 in this trial, nor does the law require
17 the prosecution to produce an exhibit
18 all papers and things mentioned in the
19 evidence. However, in judging the
20 credibility of the witnesses who have
21 testified and in considering the weight
22 and effect of all the evidence that has
23 been produced, the jury may consider the
24 prosecution's failure to call other
25 witnesses or produce other evidence shown

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1 by the evidence in the case to be in
2 existence and available.

3 Outside of the argument made here,
4 the fact that Mr. DeBose, his testimony
5 may be colored to some extent because of
6 hope of reward, what sentence may be
7 meted out by the Court is not to be
8 considered by you one way or another in
9 reaching a verdict in this case. It is
10 your job only to determine guilt or
11 innocence and before you can find a
12 verdict of guilty, it must be beyond a
13 reasonable doubt.

14 In this case, there was some evidence
15 that Mr. Stephens talked to one of the
16 Government witnesses prior to the trial.
17 There is nothing improper in this conduct.
18 As a matter of fact, in order to properly
19 prepare the defense in the case, it is
20 certainly the obligation of the lawyer,
21 perhaps to talk to as many of the
22 prospective witnesses as he can.

23 Mere presence at the scene of a
24 crime and knowledge that a crime is
25 being committed is not sufficient to
establish that the defendant participated

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1 in the crime unless you find beyond a
2 reasonable doubt that the defendant
3 participated as a conspirator, as I have
4 charged you in this particular indictment.

5 I have discussed before the fact
6 that before you can find the defendant
7 guilty, you must find that his contact
8 was intentional, knowing, deliberate.
9 In that regard, you should keep this in
10 mind. When I say the proof must show
11 that the defendant acted intentionally,
12 intent rarely, if ever, may be proven
13 directly because there is no way of
14 fathoming or scrutinizing the operations
15 of the human mind, but you may infer the
16 defendant's intent from the surrounding
17 circumstances. You may consider any
18 evidence of any statement made or done
19 by the defendant and all other facts and
20 circumstances in evidence which indicate
21 a state of mind. It is ordinarily
22 reasonable to infer that a person intends
23 the actual and probable consequences
24 of acts knowingly done by him.

25 To go back to the beginning, as I

1 told you from the very start there is
2 no obligation on the part of the
3 defendant to disprove or prove his
4 innocence. The obligation remains upon
5 the Government.

6 When you go to the jury room, the
7 exhibits will be delivered to you. If
8 you have a question, you should write
9 out your question on a slip of paper
10 and give it to the Marshal and he will
11 deliver it to the Court.

12 Your verdict will be announced in
13 open court. It is a good idea to have
14 one of your numbers serve as foreman
15 and upon questioning by Mr. White, he
16 can then announce your unanimous verdict
17 when you have arrived at one, either
18 guilty or not guilty.

19 At this time, I will ask you to
20 step into the corridor for a minute and
21 I will listen to the requests to charge
22 and exceptions to the charge by the
23 attorneys.

24
25 (Jury escorted from the courtroom.)

1 THE COURT:

Mr. Williams.

2 MR. WILLIAMS:

I have no request, your Honor. The
only exception relates to Gary Green.
It seems to me that Gary Green is
equally subject to being called by the
defense if he wants to call Gary Green.
He is not a Government agent, he is not
a Government employee. We have no
particular control over him.

10 THE COURT:

I believe, under the circumstances
in this case, that he is under the
control of the Government. You cannot
require the defendant to call anyone.

14 MR. WILLIAMS:

I agree.

15 THE COURT:

If the jury should find that there
is some important fact he may have, which
is lacking and they need, then I think
they are entitled to consider it an
inference unfavorable to the Government.
I will let that stand. Thank you, Mr.
Williams. Mr. Stephens.

22 MR. STEPHENS:

I have no exceptions, Judge. The
only request I have is I thought there
was some language on the alibi instruc-
tion that says that even though you may

1 disbelieve the alibi witnesses unless
2 you are convinced beyond a reasonable
3 doubt, - I thought there was some more
4 language. It is not included. I know
5 we have had a lot unreasonable doubt.

6 THE COURT:

Evidence has been introduced, -
7 I am looking at Devitt and Blackmar,
8 Mr. Stephens, and it has the first
9 paragraph which is introductory and then
10 it says "If, after consideration of all
11 the evidence in the case you have a
12 reasonable doubt as to whether defendant
13 was present at the time and place the
14 alleged offense was committed, you must
15 acquit him". I do not know what more
16 I could say because I did say that.

17 MR. STEPHENS:

I know you did.

18 THE COURT:

Even if they disbelieve the alibi
19 witnesses, it still would be the burden
20 of the Government to prove his guilt
21 beyond a reasonable doubt.

22 MR. STEPHENS:

That is it.

23 THE COURT:

That is certainly true.

24 MR. STEPHENS:

All right. I thought that in this
25 case, the Second Circuit in saying that

1 the alibi instruction should be given
2 even went further, that the burden
3 doesn't shift to the defendant on the
4 question of alibi, that even though they
5 may be ambivalent as to the alibi
6 evidence, the burden remains - -

7 THE COURT:

I thought I said that to them, but
8 so there is no question about it, I will
9 tell the jury that even if they dis-
10 believe, because Mr. Burse cannot be
11 charged with what other people say,
12 so even if they disbelieve - -

13 MR. STEPHENS:

The alibi witnesses.

14 THE COURT:

The alibi witnesses - -

15 MR. STEPHENS:

The burden still remains with the
16 Government.

17 THE COURT:

The burden of proving guilt beyond
18 a reasonable doubt still remains with the
19 Government.

20 MR. STEPHENS:

All right. That is what I ask for.

21 THE COURT:

All right.

22
23 (Jury returns to the courtroom.)

24
25 THE COURT:

I thought I told you this before,

1 ladies and gentlemen, but I will repeat
2 it again to make sure that there is no
3 confusion about it.

4 In this case, as you will recall,
5 evidence has been introduced tending to
6 establish an alibi. That is, the con-
7 vention that the defendant was not
8 present at the time when, or at the
9 place where he is alleged to have committed
10 the offense charged in the indictment,
11 that he was not in the area of the bank.
12 If, after consideration of all the
13 evidence in the case, you have a reason-
14 able doubt as to whether the defendant
15 was present at the time and place the
16 alleged offense was committed, you must
17 acquit him. Further, even if you dis-
18 believe the testimony of the alibi
19 witnesses here, the burden of proving
20 the defendant's guilt remains on the
21 Government and it continues to be the
22 Government's burden of proving his guilt
23 beyond a reasonable doubt, even if you
24 disbelieve the alibi witnesses.

25 Nothing further?

1 MR. STEPHENS:

Nothing on behalf of the defendant,
2 your Honor.

3 THE COURT:

4 Fine, all right. We will excuse
Mrs. English. Mrs. Rome, you have been
5 with us for some time and I think that
6 we can now excuse you from further
7 participation. We want to thank you
8 very much for your cooperation with us.
9 Mrs. English, you will be excused until
10 sometime in January, probably, and we will
11 give you some notice to that effect.
12 Will the Marshal step up and be sworn,
13 please. The two alternate jurors may
14 step out and pick up their coats.

15
16 (Two alternate jurors escorted from
17 the courtroom.)

18
19 (One male and one female Deputy
20 United States Marshals sworn as custodians
21 of the jury.)

22
23 THE COURT:

24 Ladies and gentlemen, you may now go
25 with the Marshals and begin your de-
liberations. Will the lawyers stay for

1 a minute, please, and check with Mr.
2 White to see we send down any exhibits
3 which should go. We will be in recess.
4

5 (Recess taken at 1:35 p.m.,
6 pending deliberation of the jury.)
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1 (Jury retires at 8:26 p.m. to
2 resume its deliberations.)
3

4 THE COURT:

We will be in recess.

5
6 (Recess taken at 8:27 p.m. pending
7 deliberation of the jury.)
8
9

10 * * * * *

11
12
13 PROCEEDINGS:

After recess, 10:25 p.m.

14 APPEARANCES:

As before noted.

15 (Defendant present.)

16 (Jury present.)
17

18 THE COURT:

Ladies and gentlemen, I know you
19 have been working very, very hard at
20 your deliberations and I thought it
21 might be a good idea to have you up for
22 a short break to discuss some practical
23 problems. One is that on the weather,
24 as you probably know, there was a little
25 snow before but Mr. Knisley who lives

1 in the Orchard Park area talked to his
2 home recently and the snow has stopped
3 and the roads are a little bit slippery
4 but probably are improving in their
5 condition by the minute. Furthermore,
6 I talked to my daughter earlier who was
7 out in the Colden area and left there
8 about 5:00 o'clock and drove home. It
9 was slow going but she made the trip
10 without difficulty.

11 I was looking at the list here and
12 I see two jurors, - Mr. Knisley has
13 offered, - they live in East Aurora and
14 he has offered to drive them out. I
15 want to be sure if there are other jurors
16 who have transportation problems, I want
17 to check with you if you do and if you
18 have any problems if you will just raise
19 your hand. Yes, Mrs. Bazinski.

20 JUROR NO. 12:

Well, according to the schedule the
21 last bus from the city leaves at 10:20.
22 I have my car at city line and there is
23 no way for me to get from here to city
24 line at this time.

25 THE COURT:

Your car is at the city line?

1 JUROR NO. 12: Clinton and city line.

2 THE COURT: Mr. Cioffi, you can make some
3 arrangements on that?

4 DEPUTY UNITED STATES MARSHAL CIOFFI: Yes, your Honor.

5 THE COURT: You will be with the Marshal, Mrs.
6 Bazinski, so you will be in good shape.

7 JUROR NO. 2: Your Honor, if we deliberated and
8 our last bus is 12:30 down to Abbott
9 Road --

10 THE COURT: What I wanted to say to you on that
11 was this, that there comes a time, of
12 course, and I do not mean to draw the
13 line. It is only 10:30 so that we still
14 have quite some time before that, but
15 I do not want to tell you how to go about
16 your deliberation because I have charged
17 you before. It is certainly your job
18 as jurors to come to a conscientious
19 judgment, one that must be unanimous.
20 You should not give up your sincerely
21 and conscientiously held views for any
22 petit reason. On the other hand, every
23 juror must not only give his own reasoned,
24 well-thought-out considered views to his
25 fellow jurors, but he should also listen

1 to the well-thought-out considered views
2 of his fellow jurors. Sometimes it is
3 a good idea when any one of us have a
4 problem and we go along and we are having
5 some difficulty, - sometimes the lights
6 pop when they blow out. There is no one
7 in that area anyway, so that to start
8 with a new position, perhaps start
9 approaching the problem from a new area.
10 I think it might help if I quote from a
11 statement which was contained in a Supreme
12 Court opinion in a case where a jury
13 sought to report a disagreement and in
14 that case the court, the Supreme Court
15 said:

16 "Although the verdict must be the
17 verdict of each individual juror, they
18 should listen with a disposition to be
19 convinced of each other's argument that
20 if the much larger number were for
21 conviction, a dissenting juror should
22 consider whether his doubt was a reasonable
23 one which made no impression upon the
24 minds of some men equally honest, equally
25 intelligent as himself. If upon the

1 other hand the majority were for acquittal,
2 the minority ought to ask themselves
3 whether they may not reasonably doubt
4 the correctness of the judgment which was
5 not concurred in by the majority."

6 That sets forth a viewpoint which
7 you may well consider, but again I repeat
8 it is up to each juror to review the
9 evidence and to vote according to his
10 own conscientious judgment.

11 I will ask you now to go back to
12 the jury room and to continue with your
13 deliberations.

14
15 (Jury retires at 10:31 p.m. to
16 resume its deliberations.)
17

18 THE COURT:

Anything else?

19 MR. STEPHENS:

20 Now, Judge, on behalf of the
21 defendant and for the record, we take
22 exception to the remarks which you made
23 and to the quotation from the Supreme
24 Court Reporter on the grounds, first of
25 all, that the jury has not been deliberat-
ing that long, it seems to me.

1 THE COURT: Why don't you just state your
2 objection, Mr. Stephens.
3 MR. STEPHENS: All right.
4 THE COURT: If you have one, make it.
5 MR. STEPHENS: All right. As I figure it, although
6 it is about twenty-five to 11:00 now,
7 they have been deliberating in the
8 neighborhood of six and a half hours
9 which I don't think is very long and they
10 have not sought to report any disagree-
11 ment and so we take exception to that
12 portion of the remarks which you quoted
13 which seeks to be, - or a modified Allen
14 charge about, - I have no idea how they
15 are split.
16 THE COURT: I have no idea how they are split
17 either, Mr. Stephens, but I think that
18 the circumstances should be taken into
19 account. We have had here in Buffalo in
20 December a number of severe winter storms.
21 We have had snow falls almost every day.
22 We have some jurors here who are, - I
23 would not say they are elderly, but they
24 are not youthful, certainly have trouble
25 getting about, and I think it may relieve,-

1 I wanted to relieve their minds about
2 one thing. That was one reason I called
3 them in and it also seems to me important
4 in this circumstance that the jury do
5 take another viewpoint. I do not mean
6 to interrupt their deliberations at all.
7 I know that the interruption of the
8 jury's deliberation is not a favored
9 thing, but after all, it is 10:30 in
10 the evening and as related by some of
11 the jurors here, they do have transporta-
12 tion problems which even though we have
13 given them a reassurance that they will
14 be taken care of, it seems to me it is
15 of some concern.

16 MR. STEPHENS:

Perhaps I didn't make my, - I don't --

17 THE COURT:

I know your point. You object to
18 my giving the charge.

19 MR. STEPHENS:

Right.

20 THE COURT:

And that objection is noted.

21 MR. STEPHENS:

Okay, and I don't object --

22 THE COURT:

You should make your objections.

23 MR. STEPHENS:

And I don't object at all to you
24 talking to the jurors and finding out
25 from them their bus schedules or reporting

1 to them weather conditions or anything
2 of the nature like that at all, but you
3 know in the law, in the cases, and there
4 is a long line of cases, and they talk
5 about a dynamite charge and that is the
6 expression that is used, it seems to me
7 that to throw the stick of dynamite in
8 there before they have said that there
9 is any problem or report any problem
10 is anticipatory, especially in view of
11 the fact that they have only deliberated
12 for six hours.

13 THE COURT:

You have made your point.

14 MR. STEPHENS:

All right. Thank you, Judge.

15
16 (Recess taken at 10:35 p.m. pending
17 deliberation of the jury.)
18
19

21 * * * * *

1 UNITED STATES DISTRICT COURT
2 WESTERN DISTRICT OF NEW YORK

3 * * * * *

4 THE UNITED STATES

5 -v-

6 MAURICE BURSE,

7 Defendant.

8 * * * * *

CRIMINAL DOCKET
NO. 1974-227

9
10 Proceedings of Trial held before the
11 HON. JOHN T. CURTIN, United States District Judge, and a Jury,
12 in Part I, United States Court House, Buffalo, New York,
13 resuming on January 10, 1977.

14
15 APPEARANCES:

RICHARD J. ARCARA, United States Attorney,
by ROGER P. WILLIAMS, Assistant United
States Attorney.

17 R. WILLIAM STEPHENS, Esq., Attorney for
18 the Defendant.

1 PROCEEDINGS: January 10, 1977.

2 APPEARANCES: As before noted.

3 (Defendant present.)

4
5 THE COURT: In United States against Burse,
6 Criminal Number 1974-227. Mr. Stephens,
7 I have your motion for dismissal or for
8 judgment of acquittal and for a new trial
9 pursuant to Rule 29 and 33 of the Federal
10 Rules of Criminal Procedure and I trust
11 that you have received the Government's
12 response.

13 MR. STEPHENS: Yes, your Honor. I received it
14 this morning.

15 THE COURT: In addition to the written papers
16 is there anything further you want to
17 call to my attention at this time?

18 MR. STEPHENS: No, your Honor. I know you are very
19 busy on other matters, except to say
20 that the vice and the danger of the
21 Allen charge which was given by the
22 Court during the jury deliberations is
23 that it requires the minority to re-
24 examine their position but does not
25 require the majority to re-examine their

position, so that in both instances where
you instructed the jury you said that if
a majority of you are for conviction,
then those of you in the minority might
wonder why your views aren't prevailing
and you should examine and you also
said that if the majority of you are
for acquittal. Now, the Allen charges,
there has been absolute libraries full
of stuff written about the Allen charge.
In 1896 the Supreme Court approved it.
Now, we have gone a long ways since 1896,
it is submitted, on the rights of defendants
in criminal proceedings to have a jury
verdict that is not rushed and it is the
unanimous verdict of all the jurors.

We objected to the charge as it was
given and we don't, - we just suggest
that it shouldn't have been given and
as far as our other points are concerned,
I think they are in the papers and the
Government, whoever, in their responsive
papers, they say on the question of
whether or not there should be a judgment
of acquittal, they present the standard

1 and they quote it correctly, whether a
2 reasonable juror could reasonably conclude
3 guilt beyond a reasonable doubt and then
4 they go ahead and cite cases and cite
5 the rule on whether or not there is
6 substantial evidence in the record. Now,
7 the rule whether there is sufficient
8 evidence, - the rule on whether there is
9 sufficient evidence is a different rule
10 from the rule that requires you as a
11 judge or an appellate court to determine
12 whether or not a reasonable juror could
13 conclude guilt beyond a reasonable doubt.

14 The testimony of DeBose in this
15 case gives, - makes the record sufficient
16 in legal terms because of the oft cited
17 rule that the uncorroborated testimony
18 of an accomplice if believed by the jury
19 is sufficient evidence to determine
20 guilt, but the rule on whether or not
21 a reasonable juror could conclude guilt
22 beyond a reasonable doubt is quite another
23 matter and I won't go through all the
24 witnesses here, but suffice it to say
25 that the jury calls for the testimony of

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1 Mrs. Ramos whose final line is that she
2 is sure concerning DeBose but not sure
3 concerning the defendant Burse and then
4 they come back and convict him.

5 The other point is we have raised
6 our double jeopardy claim. We have
7 raised it before the trial. We have
8 raised it after the jury was sworn in
9 this case. The anomaly of this situation
10 is that Mr. Burse who was acquitted of
11 having been involved in the substantive
12 crime of bank robbery in both the pur-
13 loining of the money and the taking of
14 the money by force, violence and intima-
15 tion, because the Government by virtue
16 of the fact that they allege that the
17 substantive crimes are overt acts in the
18 conspiracy because they have set the
19 indictment forth in that fashion, we
20 come to the final point that the jury
21 convicts Burse because they believe he
22 was involved in the bank robbery, a
23 charge on which a jury has prior brought
24 in an acquittal verdict. Now, there may
25 be some legal mumbo-jumbo that permits

1 that under the double jeopardy clause,
2 but I submit to you that it has prejudiced
3 Burse, that his rights have been violated
4 by this conspiracy conviction and that
5 the prosecutorial misconduct found by
6 the Second Circuit is the only reason
7 why he is required to undergo a second
8 trial and for all those reasons we ask
9 for a judgment of acquittal or for
10 dismissal or finally for a new trial
11 because the Allen charge as given by
12 your Honor, and your Honor read it from
13 the, no question about it, from the
14 Supreme Court Report of 1896 and you read
15 it the way it is set forth there, but
16 that just should not have been given and
17 it rushed the jurors into a verdict.
18 There is a story told, Judge, and this
19 will only take thirty seconds, there is
20 a story told about a judge down in the
21 Southern District in a civil case --

22 THE COURT:

Not Mr. Firestone.

23 MR. STEPHENS:

24 No. If I ever tell that one again,
25 the jury just didn't, - if I had the
case to try over again, I wouldn't tell

1 the Firestone story, but there is a
2 story told about a judge in a civil case
3 in the Second District. The jurors
4 were gathering their coats together and
5 on the way to the jury room and he said
6 to one of the attorneys "Is there any
7 additional requests" and the attorney
8 said "Well, yes, I request, Judge, that
9 you instruct the jury that it is the
10 quality of the evidence and not the
11 quantity of the evidence that determines
12 what your verdict should be and you don't
13 count the witnesses and say that there
14 were six witnesses for one side and three
15 for the other", and the judge said "That's
16 right, ladies and gentlemen of the jury,
17 it is the quality of the evidence that
18 counts, not the quantity. This is a
19 trial, not an election". Now, the Allen
20 charge that says that the minority should
21 re-examine their views is nothing more
22 than saying that for some unexplained
23 reason if seven out of twelve are leaning
24 one way or the other that that is the
25 view that the minority should take and

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OFFICIAL REPORTERS, U. S. DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

1 so we submit to you that it is true,
2 it is more true in criminal cases that
3 it is a trial, not an election, and how
4 seven of the jurors may be disposed on
5 the question of a verdict is not the
6 question that the jury should examine
7 when they have been deliberating for
8 more than three or four hours, and so
9 for all the reasons in our papers, Judge,
10 we move for the relief requested and
11 we will be back here on the 17th in
12 the event that those motions are denied,
13 and I thank you.

14 THE COURT:

Is there anything you want to say,
15 Mr. Williams? I have read your papers.

16 MR. WILLIAMS:

Your Honor, I don't know what more
17 I can add over and above the papers.
18 Certainly with respect to the Allen
19 charge, it has been approved time and
20 time again. It is a standard charge
21 that has been given many times in the
22 past. The Second Circuit Court of
23 Appeals nor the Supreme Court have ever
24 seen fit to overrule that charge. I
25 would just rely upon the memorandum I

submitted, your Honor.

THE COURT:

I believe the record should note that Mr. Burse is present here with his counsel. As far as the first count for an order dismissing the indictment in this case on the ground that defendant has been twice placed in jeopardy for the same crime and has twice been tried for participating in a bank robbery after having been acquitted of the substantive bank robbery charge, that particular ground was urged before the trial and I think that the reasons given in the prior decision of this Court still apply. I do not believe that there are any additional facts which occurred during the second trial which would be pertinent to this ground.

I think it should be noted, however, that there was not only a reversal in the first trial because of the, - not Mr. Williams, but because of remarks made by the Assistant United States Attorney who tried the case, but also because the simple failure of the Court

1 to give the alibi charge which the
2 second court directed certainly should
3 have been given under the circumstances.
4 It also should be noted that the jury
5 in fact did acquit Mr. Burse in the
6 first trial of the charge of robbery and
7 of the charge of larceny. There, as
8 the record clearly indicates, the
9 history was that because of the obstinacy
10 of the Assistant, - again, not Mr.
11 Williams, - that neither the Court nor
12 counsel were aware, although it had been
13 requested sometime, of the theory of
14 the Government, whether or not Mr. Burse
15 would be charged as an aider and abettor
16 and because of the refusal of the
17 Government to make their theory known to
18 defense the Court refused to charge the
19 jury that they may consider Mr. Burse
20 as an aider and abettor. It is very
21 difficult to look into the hearts and
22 minds of jurors but it seemed to me that
23 that had, no doubt, some bearing upon
24 the jury's verdict in the first case in
25 acquitting of Mr. Burse on the first and

1 second count.

2 Now, as far as the second point
3 here for an order of the Court entering
4 judgment of acquittal pursuant to Rule
5 29(c) on the ground there exists a
6 reasonable doubt of all testimony as a
7 matter of law, we had the testimony of
8 Mr. DeBose which was corroborated by
9 testimony of other witnesses. I know,
10 Mr. Stephens, what you had to say about
11 the testimony of Mrs. Ramos is borne out
12 by the record, but on the other hand,
13 the jury is entitled not only to consider
14 the witness' answer to a particular
15 question, but all of the witnesses'
16 testimony and it seems to me that from
17 looking at her testimony as a whole, the
18 jury could have come to the conclusion
19 that she did identify Mr. Burse as one
20 of the young men who ran through her
21 yard on the day of the robbery. There
22 was also the testimony of the other
23 witness, the lady who lived on Steeławanna
24 Avenue. What was that witness' name?

25 MR. WILLIAMS:

Evon Wright.

1 THE COURT:

Mrs. Wright.

2 MR. WILLIAMS:

Yes.

3 THE COURT:

4 Who told of the fact that Mr. Burse
5 and DeBose were in her apartment shortly
6 before and shortly after the robbery
7 occurred. I know that on cross examina-
8 tion you did bring out the connection
9 between this lady and Maurice Burse's
10 brother and the fact that he also was
11 on or about the premises during this time,
12 but these were fact questions for the
13 jury to determine and it seems to me that
14 the jury was well within common sense in
15 finding, in determining if their theory
16 was that Burse was not in the bank the
17 testimony would seem to bear that only
18 Mr. Burse was in the bank. Whether or
19 not he was the young man standing in the
20 doorway, they may have come to the
21 conclusion that he was not. Nevertheless,
22 because of the testimony of DeBose, Ramos
23 and Wright, they could have come to the
24 conclusion that he was in on the planning
25 before and immediately after the occurrence.

Of course, we have discussed the

1 propriety of the Allen charge the evening
2 of the jury deliberation. I think a
3 reading of it would indicate it certainly
4 was a very soft encouragement to the
5 jurors to come together. As I remember
6 the time sequence, that the weather was
7 not as bad as today, but it was sort of
8 a nasty evening. The jury came up about
9 10:30 when this additional encouragement
10 was given to them to deliberate
11 conscientiously and they did because they
12 deliberated for about another hour,
13 almost an hour and a half. Maybe not
14 perhaps that long, but certainly over an
15 hour before they finally came to their
16 unanimous verdict.

17 As far as the photographic identi-
18 fication procedure, there the jurors
19 answered the Court's inquiry after the
20 verdict was announced. It would appear
21 that only one person said that she did
22 not believe, - or she believed the
23 testimony of Mrs. DeBose. The other
24 jurors said that they did not consider
25 it one way or another. I know that it

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1 was sort of an unusual way of proceeding.
2 On the other hand, after we had that
3 additional, or that conversation about
4 whether a particular question should be
5 given to the jury along with their
6 general verdict, the case of United
7 States against Spock decided by the First
8 Circuit came to my attention. There the
9 Government, - in that case the Government
10 urged that interrogatories be submitted
11 to the jury in the criminal case and the
12 District Court did submit the interroga-
13 tories. The First Circuit in reversing,
14 they traced the history of this kind of
15 procedure in criminal cases and it seemed
16 to me that their reasoning made good
17 sense, that the giving of interrogatories
18 to the jury in a criminal case is a
19 practice to be frowned upon. Here I
20 think that the jurors answers perhaps
21 indicated good reason why that was so.
22 Most of the jurors responded saying they
23 did not take this into consideration one
24 way or another. We did have in this
25 case the testimony of Mrs. DeBose who

1 said that certain pictures were shown
2 to her. We had the testimony of the
3 FBI agent who just as firmly insisted
4 that the pictures were not shown to her.
5 Frankly, it seems to me that where the
6 truth lie in that particular part of the
7 case is most difficult, a most difficult
8 question and, frankly, it seems to me
9 that if I were to try the facts in this
10 case, that I would have to agree with the
11 view of most of the jurors. I just could
12 not tell. On the one hand, Mrs. DeBose
13 who was certainly a lady not acquainted
14 with criminal investigations, it seems to
15 be most unusual that she would recall
16 that an agent came to her and showed her
17 particular pictures and in particular
18 sequences because many, many people in-
19 cluding lawyers who do not try criminal
20 cases are not familiar with the procedures
21 used by FBI agents in investigating
22 criminal cases. On other other hand,
23 the agent who, although in cross examina-
24 tion in other respects was, as pointed
25 out by you, Mr. Stephens, he had made

1 some errors, yet as far as this particular
2 part of the case is concerned, he was
3 just as firm in saying that he did not
4 show these other photos to her and it
5 seemed to me that to do it in that
6 fashion would certainly violate standard
7 FBI and other good police procedure in
8 view of the Wade case and other cases
9 we are aware of in photographic identifi-
10 cation, so the judgment of the jury
11 saying "We cannot make up our mind on
12 this question one way or another" seems
13 to be good sense and as a matter of fact,
14 it would not be necessary for them to
15 resolve this particular point in order
16 to reach a verdict. On the other hand,
17 if we had asked them that particular
18 question and told them to answer it before
19 they delivered the general verdict, it
20 seems to me that they would have then
21 been completely hung up on an issue. It
22 is an important issue. I think to say it
23 is a side issue is not the correct term,
24 but it is an issue not absolutely
25 necessary to resolve in order to reach a

1 verdict in this case so that as far as
2 the photographic identification procedures
3 which were used, I cannot find under the
4 circumstances that they were impermissibly
5 suggestive and I do not so find.

6 Therefore, your motion, Mr. Stephens,
7 made pursuant to Rule 29 and Rule 33 is
8 denied and we will have the sentencing.
9 It is set for January 17th.

10 MR. STEPHENS:

Yes, your Honor.

11 THE COURT:

January 17th. Will you prepare an
12 order, Mr. Williams, please.

13 MR. WILLIAMS:

Yes, your Honor. Thank you.

14 MR. STEPHENS:

Thank you, Judge.

15 THE COURT:

Thank you, Mr. Stephens.

16
17 (Proceedings herein recessed.)
18
19
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21 * * * * *

AFFIDAVIT OF SERVICE BY MAIL

STATE OF NEW YORK)
: SS.:
COUNTY OF ERIE)

Mary Ann Battaglia, being duly sworn, deposes and says that she resides at 40 Stillwell Avenue, Kenmore, New York 14217 and is over the age of 21; that on the 17th day of March, 1977, she served a copy of the annexed Appendix upon the United States Attorney, attorney for the United States of America in the within entitled action, by depositing a true copy of same properly enclosed in a postpaid wrapper in a Post Office box regularly maintained by the United States Government at 10 Lafayette Square, Buffalo, New York, directed as follows:

United States Attorney
United States Courthouse
Room 502
Buffalo, New York 14202

Attention: Roger Williams, Esq.

that being the address designated by them for that purpose upon the preceding papers in this action.

Mary Ann Battaglia
Mary Ann Battaglia

Sworn to before me this
17th day of March, 1977.

David C. DiFenocchio
Notary Public

DAVID C. DIFENOCHIO
Notary Public State of New York
Qualified to Take Oaths
My Commission Expires 12-31-77